Citizens Enforcing the Law

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Citizens Enforcing the Law

The Legal and Social Space for Citizen's Arrest

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Content

Abbreviations

Art:	Article
AH:	Albert Heijn Supermarket
HR:	Hoge Raad. In English: Supreme Court
Sv:	Wetboek van Starfvordering. In English: Criminal Procedure Code
Sr:	Wetboek van Strafrecht. In English: Code of Criminal Law
MvT:	Memorie van Toelichting. In English: Summary of Parliament Discussions
GW:	Grondwet. In English: Constitution
ECHR:	European Convention on Human Rights
Wet RO:	Wet Rechterlijke Ordening. In English: Law for Judicial Organization
PW:	Politie Wet. In English: Police Act
ovar:	ontslag van alle rechtsvervolging. In English: dismissal of the charges
avas:	afwezigheid van alle schuld. In English: absence of all fault
AG:	Advocaat General. In English: General Attorney
WVW:	Wegenverkeerswet. In English: Traffic Act

Preface

This book is the result of a very long development process. People usually compare PhD theses with journeys. I personally assimilate it with an "*Entdeckungsreise*" (voyage of discovery). A voyage that led me to develop new skills, to understand things differently, to get acquainted with new topics, and somehow, also to get to know myself.

As a trained lawyer, I was skilled at using the interpretative methods lawyers use. I could do systematic analysis of norms and theories, look for consistencies and inconsistencies in norms and schemes. However, I had decided to grow in a new direction in my professional future. I was curious about the "alchemy" social scientists perform when they "make sense of social phenomena". How were they able to look at events from such different perspectives in order to explain them? I wanted to learn from them. I was therefore glad that my thesis required a search for different rationalities. I had to understand how "norms", "crime" and "correct behaviour" are socially constructed by looking at the sense legal practitioners and citizens make of norms and behaviour. To achieve this, I had to discover the ethnographer in myself, and this was hard work.

I had to acquire some new skills. The first was managing the main tool of social science sorcery: putting questions. Which questions were productive? Which would get me further towards the goal of enhancing knowledge, and which would close a path? Pitfalls and progress recurred alternately, and I felt frustration and fascination. I thank Willem, my promoter, for showing me the power of questions and how to obtain acuity in answering them.

Second, I had to be able to ask the lawyer in my mind to leave the room to allow the social observer and analyst to come to the fore. Martina Althoff performed a great feat of perseverance here, providing references and advice for my methodology and openings for discussions. My thanks go to her and to Jan Nijboer, who guided my first steps in constructing a sample for my research.

However, not only did I have to discover a social-scientist perspective for myself for this research, I also had to learn the Dutch legal system, because its legal terms and institutions were new to me. I began with textbooks, to gain a first impression of the functioning of the legal system, and the criminal justice system in particular. Progressively, I was able to step into the criminal legal jurisprudence, the law and the case law dealing with my topic. Jelte Hielkema, from the beginning, and later on also Erik Gritter, were of great support in this. Their advice and comments helped me to reach the necessary understanding of the Dutch legal system, its logic and the logic of its exceptions. My thanks go to them.

To end, this voyage of discovery not only led me to acquire new skills and knowledge of topics and issues of the external world, but also to develop myself, my inner world, further. I realised that learning is not a linear process and that learning was not merely what I expected it to be. Confusion and vagueness were important steps that I needed to take to achieve order and understanding. I learned about my own limits and the limits impatience made for me. I learned the meaning of frustration and endurance in a new way. I learned about the relevance of having the right companion at my side.

For all their advice, support, laughs and chats, which I will never forget, I am truly thankful to my friends: Claudia, Eva, Iván, Max, Aitana and Karen.

My thanks go also to you Harry for our wanderings along the river in Groningen, and for your English delicacy in offering comments on my English.

Thank you both, my paranymphs. To you Tony, for taking care of me in all your serenity, and for your permanently positive view of things. Thank you Idlir, for your boundless confidence in me, and your unique friendship.

Mi especial agradecimiento va a vos mamá. Por nuestras conversaciones telefónicas trasatlánticas; y en ellas, por tu oído inquisitivo y experimentado de investigadora, por la confianza y el aliento cuando me faltaron ambas cosas. Gracias hoy otra vez, por estar en a este festejo.

To end, thank you Erica. Thanks for all your quiet patience these years, your infinite support, your patient love.

La Paz, September 25th 2013.

I. Introduction

In a society where the state monopolizes the use of force, citizens are in principle excluded from the enforcement of law, and forceful responses from citizens are thus forbidden. Historically, the criminal justice system and criminal norms have sought to eradicate forms of *eigenrichting*[1] as they developed. The enforcement of laws and the use of forceful means in their enforcement were trusted to the state's organs, which for citizens meant a limit: almost any form of the civil use of physical force was criminalized.

In the legal sciences almost every definition of *eigenrichting* deals with the limits to it. Some commentators consider that anyone who acts in *eigenrichting* oversteps legal limits (Kelk, 2005 and Van Wifferen, 2003), while others note the presence of conflicting normative visions in these acts: of the actor convinced of acting legitimately, and of the law, which does not allow such action (De Waar, 1984). However, the law remains silent, and instead of providing a concrete prohibition for *eigenrichting*, protects everyone's civil rights and liberties, allowing their restriction only when this is necessary to effect law enforcement – in principle, by civil servants. Our whole legal system rests upon this principle, known as the rule of law.

From the eighties of the previous century onwards, however, the traditional limits to *eigenrichting* seem to have been in motion. Given the perception of widespread criminality and the inability of police and the criminal justice system to control it, citizens are called upon to no longer remain passive when confronted with criminal acts, but to assume responsibilities in the social control of crime. Citizens are encouraged to act independently, in addition to or instead of the police. Citizens, it is said, must and also do play a role in the enforcement of the law.

Where previously only the police and professionals were entrusted with this duty, today the government claims that policing cannot be left to the police alone. And where previously, individuals and communities were the addressees of a service, today they are called upon to join a chain of actors in the 'fight against crime'. This strategy, through which private individuals are summoned to assume an active role in law enforcement, is called 'responsibilisation' because now the enforcement of laws is also the responsibility of victims and potential victims. Responsibilisation, as a strategy, is a salient aspect of the crime control policies in the Western World (Garland 2001). In fact, this aspect is so salient that some speak of a new paradigm (Crawford 1997). David Garland synthesizes the

[1] *Eigenrichting* is composed of the term '*eigen',* which means private and '*richting*', which means direction (Van Dale Etymologish Woordenboek). Etymologically speaking, *eigenrichting* therefore means giving a personal direction to things. Popularly speaking however, *eigenrichting* is understood, as 'taking the law into ones owns hands'.

responsibilisation strategy with a conglomeration of other aspects in current policies, to speak of a new paradigm in crime control, which he calls 'the culture of control' (2001).

The origins of responsibilisation

The origins of responsibilisation were already visible in the latter half of the 1960s (Garland 1996, 2000). By that time, investigations had begun to show a steady increase in crime rates, accompanied by high levels of recidivism. Research showed that the formal process of criminal justice appeared unable to control crime, and in the 'nothing works' era of the 1970s, many pointed to prisons, courts and the police as being responsible for the failure. Prisons were seen not as 'rehabilitating' prisoners, but as reproducing deviant behaviour; courts were expensive and slow, and the police ineffective, distant from citizens and often abusive. The issue of 'crime' then turned increasingly into a public discourse (Crawford 1997; Garland 2000).

Many signal today that this disenchantment with the performance of institutions was part of a more general political and social process affecting the 'governmental ethos' (Stenson, 2001). From the Second World War on, the welfare state, especially in northern Europe, assumed a role as the main provider of safety and wealth in society (Van Swaaningen, 1999). There was an optimistic belief that the state would realize a more equitable and just society, promoting social justice through universal services. Everybody at that time trusted in professionals and other experts in the criminal justice system to cure the personal and social dysfunctions leading to criminal behaviour. The control of crime was by that time part of the routine of government and the administration. However, by the 1970s, crime rates showed a steady increase and the criminal justice system seemed unable to contain it.

High crime rates were regarded as an unavoidable condition of urban life at that time, as criminologists began to show that the solution for rising crime rates would not be found by changing the criminal himself through the work of expert institutions: 'criminals' seemed to be incorrigible (Garland, 2000). The key was reducing the opportunities offered by victims, improving the environmental conditions that make crimes possible and increasing vigilance. The occurrence of crime turned into a question of risks, 'hot spots' and environmental design that had to be approached locally. Crawford (1997) signals as a first step on this revolution, the spread of community policing programmes across the UK and the US. According to Crawford, Community policing programmes were established with the aim of improving the articulation between community and the police, distributing information about risks and encouraging citizens to look for support from local officers. The next step for Crawford (1997) is the appearance and fast dissemination of neighbourhood watch schemes, which encourage citizens and families to be more 'crime conscious' (Garland, 1996), creating forms of internal community control and regulation, and including patrols by 'active

citizens'. The conclusion is the construction of 'joined-up' programmes with private agencies and communities aiming at the increase of effectiveness, and the enlargement of the reach of the state's arms (Hughes and Edwards, 2002).

Responsibilisation in the Netherlands

In the Netherlands, the responsibilisation strategy had its official birth with the white paper '*Samenleving en Criminaliteit*' (Society and Criminality) of 1985 (Van Swaaningen, 2005; and Boutellier, 2005a, 2005b) in which the government set out its aim to unite efforts against crime with every citizen and the community. The white paper was based on the conclusions of a Parliamentary Commission, which was named after its chairman, the 'Roethof Commission', convened in the early 1980s. The Committee was called to find answers to the increase in the rates of petty criminality, and it found the causes of this increase in the loss of social bonds in families and neighbourhoods, and the weak structures of informal social control: both consequences of developments in modern societies. The Commission claimed that petty criminality could be better managed outside the criminal justice system and its sanctions, basically through social and community actors, as they are capable of restoring social bonds in communities. The mentioned white paper ('*Samenleving en Criminaliteit*') called on social organizations and local public institutions to take part in crime prevention. Institutions for social assistance and the police were aligned to contribute with local authorities, and particularly city councils, to prevent petty criminality such as vandalism, graffiti or antisocial noise. Citizens were prompted to exercise greater informal social control to help produce local security.

In the 1990s citizens began to take part in 'self-reliance' (*zelfredzaamheid*) experiments in different cities. The projects were meant to 'expand the capacities of citizens to find a solution for what they perceive as unsafe' (Toenders et al., 2002:11). Within the framework of these projects, police officers began to work with community activists to mobilize neighbours to find solutions for security problems in their neighbourhood. These experiments were a prelude of what would later become public policy.

In 1999 in the white paper '*Integraal Veiligheidsprogramma*' (Integral Safety Programme), responsibilities were down-scaled from the criminal justice system into different administrative offices. What Crawford (1997) describes as a turn to community safety elsewhere, was the 'integral' safety programme in the Netherlands. By the end of the 1990s, the politics of security in the Netherlands were becoming a matter of comprehensive multi-agency cooperation. Housing corporations, private security companies, education institutions, commerce associations and neighbours

were cooperating with police and administrative authorities in a sort of '*polder model*'[2] for security (Van Swaaningen, 2005).

As in other countries, the 'actual' tasks of the police were also under discussion, with the conclusion that certain tasks were transferred to other agencies, and others were subordinated to more relevant priorities (Van der Vijver et al., 2001). This meant for instance that the private sector had to assume the provision of security in certain spaces: either permanently in semi-public areas (such as shopping areas), or occasionally, at events involving crowds such as soccer games. It also meant that resources were reallocated from some minor disorders and crimes, to focus them on more serious ones where the chances of success were greater. The police have since then taken on a rather forging role, stimulating an endless stream of local initiatives for 'assertive' citizens. This trend is also echoed in the legal world, becoming visible in the legal jurisprudence, especially in the last sixteen years,[3] where case law indirectly enlarged the space for citizen's arrest as it enlarged the space for self-defence and the improper use of self-defence.

As part of the policy, citizens were trained to mediate in conflicts, in reaching agreements with neighbours about proper manners in public spaces, and were encouraged to actively approach and reprimand those who deviated from proper polite behaviour. Terpstra and Kouwenhoven (2004) compiled and studied the genesis of many of these initiatives, showing how 'partnership projects' between the police and local authorities and citizens have come to assume responsibility over surveillance, the imposition of conventional and alternative sanctions, infrastructural improvements in neighbourhoods, and crime prevention and enforcement of public order. Police officers participate in starting these initiatives, explaining that neighbours themselves must actually be the producers of their own safety and must set aside many of their expectations of the police.

Some commentators suggest that these developments in crime control policies challenge the state with finding a way to retain its supremacy in the use of force for law enforcement, while at same the time communicating that 'the state cannot do it alone' (Crawford, 1997; Garland, 2001; Boutellier, 2005a). The responsibilisation strategy could be forging in this sense the same occurrence of *eigenrichting* in different ways. First, by

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[2] The polder model is a term used to describe the Dutch version of consensus-based economic and social policy making. The model bases on the cooperation between different, and sometimes conflicting, parties (The Economist, 2002. Model makers. May 2).

[3] Buruma (2003:117) signals that 'the first positive bending took place in 1997' with the '*tuinderskasarrest*' (HR NJ 1997, 627) a decision where the HR indicates the relative weight of provocations (*culpa in causa*) to exclude the viability of the self-defence.

making citizens crime-conscious to avoid victimization, it is giving vent to feelings of annoyance, insecurity and revenge against those who are seen as 'criminal' (Karstedt, 2002; Evans, 2003). Second, by encouraging citizens to be self-reliant and do something to prevent crime on their own, it is contributing to the erosion of the citizen's confidence in criminal justice institutions (Van Swaaningen, 1999; Schuyt, 2004). Finally, by calling on citizens to be assertive and contribute personally to arresting suspects, it is exposing them to criminalization, for the legal limits for citizen's arrest are strict (O'Malley, 1992; De Roos, 2000).

Citizen's arrest

One particular form of citizen law enforcement, citizen's arrest, is causing public concern in the Netherlands, especially when citizens appear to be crossing the line between what is allowed and what is not. Citizen law enforcement consists of the actions of citizens directed to reach compliance with the law. These actions can either seek to prevent unlawful acts (proactive law enforcement), or react to crimes to help in their investigation (reactive law enforcement). In principle, only civil servants such as the police can perform reactive law enforcement, because in so doing, civil rights and liberties can be affected. An arrest is one specific form of reactive law enforcement in which a suspect is deprived of his or her freedom in the name of a criminal investigation. An arrest can be effected with or without the use of physical force, but in every case it implies a restriction of rights and liberties. That is why the state monopolizes forceful means in society and the practice of arrests is entrusted to specialized civil servants like the police. Citizens, however, are under special circumstances endowed by law (Art. 53, 1Sv) with the authority to use means of coercion and effect arrests, but this authority is held within strict limits. Citizens can only use proportionate and necessary physical force on suspects. Citizen's arrest is a specific form of citizen law enforcement, namely a reactive one, in which a citizen detains the suspect of a crime because the latter is caught red-handed committing a crime and must be surrendered promptly to the authorities for investigation.

Although citizen law enforcement can be proactive and reactive, when I use the term here, I am referring to reactive citizen actions taken to enforce the law. My use of the term citizen's arrest refers to a concrete form of it, in which a citizen uses physical force on a suspect to stop that suspect, with the aim of delivering him or her to the police to enable criminal investigations. By physical force I mean the range of forceful action, ranging from extreme physical force to moderate physical pressure such as actual bodily harm. I exclude acts causing no harm, pain or injury.

Eigenrichting and citizen law enforcement both apply to the reactions of citizens who, seeking to correct a state of affairs, affect the protected rights of others. The difference between them is that *eigenrichting* refers to actions that overstep the limits of the law. *Eigenrichting* is thus the illegal form of

citizen law enforcement and it is in this sense that the term is used in this research.

Recently, the criminological literature has begun to apply the term 'vigilantism' to a phenomenon similar to *eigenrichting*. Vigilantism is understood as 'a social movement giving rise to premeditated acts of force – or threatened force – by autonomous citizens which arises as a reaction to the transgression of institutionalized norms by individuals or groups' (Johnston, 1996:232). Although vigilantism could be seen as the proper English term to translate '*eigenrichting*', my choice to use the Dutch term here reflects the fact that vigilantism also refers to situations deliberately excluded from the scope of this research: planned and group actions. For some commentators (Haas, 2010; Dumsday, 2009; Johnston, 1996), vigilantism is necessarily a planned criminal act, because it demands a deliberate choice to resort to vigilantism. Spontaneity is a characteristic that the mentioned authors exclude from the same concept (De Haas, 2010: 32; Johnston, 1996:222). In this research, however, only spontaneous reactions are considered, and planned (vengeful) acts are explicitly excluded. Something similar applies to the idea that vigilantism is a 'social movement', because it refers to acts of vigilantism undertaken by organized groups (Davis, 2007; Johnston, 1996). For Davis (2007:6) vigilantism is 'institutionalized private violence in the reproduction of the racial and social order...repressive activity and summary justice by non-state actors'. Davis studies the US-American vigilant tradition and the role of vigilante groups in reproducing racial and class domination, especially during the Great Depression in the United States. In contrast, here I am interested in the social and legal limits of acts that individual citizens undertake. Therefore, to avoid a misleading understanding of the phenomenon studied here, I opted to use the Dutch term *eigenrichting.*

Eigenrichting has also caused concern in the Netherlands recently, where ordinary citizens have been prosecuted and convicted for taking action against the suspects of crime. An analysis of these cases shows that they involved citizens pursuing thieves or intervening in violent encounters, as well as employees and shop owners trying to stop robberies by hitting or shooting the perpetrators. When cases like these came to the attention of the public authorities, such as public prosecutors, they were quick to condemn such reactions, arguing that they ought to be discouraged as impermissible forms of *eigenrichting*, *i.e.* revenge. However, when citizens, employees and shop owners were actually prosecuted, a heated debate evolved about citizen's arrest[4] and the extent to which citizen law enforcement is or should be permissible. If the maintenance of law and

[4] The late Prince Bernhard reinforced public attention to this issue when he publicly announced to be willing to personally pay the fine imposed on a supermarket owner who got involved in a fight with a shoplifter he had caught red-handed.

order is not and cannot merely be a task for the police and the criminal justice system, a more flexible approach towards *eigenrichting* in criminal law might be required in order to allow citizens to play an active role.

An analysis of this debate will enable me to uncover two contradictory perspectives: an 'enabling' and a 'constraining' one.

The 'enabling' perspective, mainly prevalent in socio-political circles, argues that citizens are called upon to help combat crime, but criminal law still offers citizens too little space for involvement in law enforcement (Volkskrant, 18.01.05; 22.01.05). From this standpoint, criminal law should ease restrictions on citizen's arrest, enlarging the permitted use of physical force.

The 'constraining' perspective, mainly prevalent in the legal sphere, argues that the legal limits for citizens' use of coercive means need to be tight. The use of physical force must be kept in the hands of the state as this is the way to assure its objective (dispassionate) and rational (proportionate) use (Rutten, 1961; Foqué and t' Hart, 1990; Lissenberg, 1998). It is thus feared that opening the legal space for citizen's arrest to debate could result in a spiral of escalating violence and revenge that would endanger general civil rights and liberties (Knigge, 2002). For some political actors, in contrast, the same limits should be expanded to let citizens help combat crime on the streets.

The Research problem

The debate about the limits to citizen law enforcement suggests that a gap exists between state law and the law on the streets, i.e. the ideas that ordinary people have concerning the use of force during citizen's arrest. According to some, such as Knigge (2002), the existence of such a gap is an indication of rising subversive ideas forging more space for citizens to use physical force against the state's monopoly over forceful means. To others, such as De Roos (2000), a gap between state law and the law on the streets might simply result from confusion over the actual legal space for citizen involvement in the maintenance of law and order. People could be mistaken in approving of subversive acts and ideas while believing that they are, in fact, legal. For De Roos, legal institutions are sending contradictory messages, leaving citizens uncertain whether their involvement in law enforcement will be prosecuted. Citizens might approve of citizen law enforcement without really knowing the legal limits for citizen's arrest.

This study aims to contribute to this debate. First, by establishing to what extent such a gap exists between state law and the law on the streets. Second, by determining whether augmenting the legal space for citizen's arrest to match the space claimed by citizens would undermine the state monopoly over forceful means or, alternatively, contribute to the enforcement of law.

Explaining eigenrichting

Eigenrichting is a term embracing a broad phenomenon, broader than the one studied here. It ranges from spontaneous and individual reactions to premeditated and even collective ones. Popularly, *eigenrichting* is understood as the act of 'taking the law into one's own hands', and as such is disapproved of. In English the term is translated as 'self-help', the engagement of individuals to put things 'right', when lacking the help of third (hierarchical) parties. In the socio-legal sciences self-help refers to the ways in which people 'correct' things. The concept of self-help refers to human actions which, first, are undertaken independently from the state or other hierarchical third parties (Ellickson, 1991); second, which aim to restore 'acceptable standards'; and third, which are charged with 'legal beliefs' – where the actor is convinced of 'being in the right' (Rieder, 1984). Self-help hence has a moral character. The actor in self-help seeks to enforce norms and accepted standards, moved by what he considers his own right.

Donald Black (1983), a sociologist of law, states that *eigenrichting* or, as he calls it, 'self-help', is pervasive in society because there are social settings that the law hardly ever reaches. People try in those social settings to 'put things right' on their own, to 'make justice', although they are often criminalized while doing so. Black does not explain why some people consider 'right' what the law forbids, but signals that in acts of self-help, different images of what is lawful indeed seem to clash: the law living in people, and the law of legal practitioners.

Black is drawing on a tradition in legal sociology going back to the work of Ehrlich (1912), who explained that there is actually never only one law in society. There are in fact 'living laws' governing the actions of people in real life, and 'norms for decisions' applied and produced by legal practitioners in the courts. Between them, there is more often than we tend to believe, a gap.

Legal sociologists have conducted a great deal of research to determine whether such a gap between state law and living law really exists. They discovered that there are in fact distinctive 'legal consciousnesses' among people, and they have different ideas of what is fair and desirable (Trubek, 1984). Different people hold to different 'doctrines' about what is just or acceptable in a case, as these doctrines are the normative ideas people hold and apply to cases. They depend on the experiences people have of the law and the ways they interpret their experiences (Sarat 1990, Engel 1998).

If people's legal consciousness thus depends on their experiences and the ways they interpret experiences with crime, the way they perceive criminality and responsibilisation will also shape their ideas about what is fair and desirable with respect to citizen law enforcement. From a legal point of view, however, some expressions of legal consciousness are compatible with state law (hegemonic) and others are incommensurable (subversive) to it. Understanding the coherence or incoherence between

people's legal consciousness and state law is a central problem in this research, especially with reference to citizen law enforcement.

The main questions of this research

In order to approach this problem, the social and legal norms enabling and constraining the use of force in citizen's arrest will be studied. Through empirical social and legal research, I[5] will study when and why the actions of citizens apprehending the perpetrators of crime are accepted or reproved, by citizens and by the state law. I will attempt to determine whether the supposed gap exists between the space the law recognizes and the space that citizens assume belong to them. If a gap exists, I will describe how and explain why the gap opens between the two spaces, and make some modest proposals for bridging it.

The research design

In this study the boundaries between citizen law enforcement and *eigenrichting* will be explored by looking at how the law and people set limits in cases of citizen's arrest. In the legal part of this research, I will explore the criminal law, jurisprudence and case law to determine which legal norms constrain citizen law enforcement and which norms enable it. This will bring me to the study of the authority vested in citizens to effect citizen's arrests. However, since cases of citizen's arrest normally occur in a continual process of actions and reactions, the arresting citizens could be the objects, for instance, of counteracting aggressions and see themselves as needing to act in self-defence.[6] For that reason, I will also study other legal categories (defences-justification and defences-excuse), which could come into judicial consideration when charges are brought against arresting citizens. To make the legal ideas concrete, I will study four cases dealt with by the courts (HR and Courts of Appeal). I have selected these cases because they stipulate three controversial aspects of *eigenrichting*. One case deals with the legal limits of proportionality, a second one specifies the limits of necessity, and two final cases treat the limits of immediacy: the first revealing the limits to pre-emptive strikes and the second the limits to retaliatory harm. Analysing these four cases allows me to clarify the line between (unlawful) *eigenrichting* and (lawful) citizen law enforcement, and to understand the rationale judges apply in deciding whether a citizen crossed that line and, therefore, committed a crime.

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5 Following a tradition in the social sciences, the personal pronoun 'I' is systematically used in this text to denote the entity of the researcher (Becker, 1986).

6 Defences excluding criminal liability such as self-defence or the state of necessity are, as we will see, legal categories intrinsically different from citizen's arrest. Their consideration here responds to the need to illustrate 'the legal limits' within which citizens move when they effect arrests and are confronted by the reactions of the arrested citizens.

In the socio-legal part of this research, my first step is to confront a number of respondents with these four cases and explore the limits that they define in response to these cases. I want to determine if people knowingly set their limits beyond legal limits. If I find that people knowingly accept that others or they themselves may illegally take the law into their own hands, I will consider that a first sign of rising subversive ideas. The state's authority would thereby be challenged, as people would be knowingly accepting illegal acts. My first question is thus whether people approve of and are also willing to accept illegal forms of citizen's arrest while aware of the fact that the acts they accept are illegal. Approval is an expression of support with respect to the acts of others; willingness is a stronger form of support in which a person also expresses a preference for the individual's actions. People are aware of accepting acts beyond the law when they consider that the act they accept would be condemned or disapproved of by the law or its officials, and they accept it nonetheless. In answering my first question, I establish whether the gap exists and its breadth. I will measure whether illegal citizen's arrest is merely tolerated, or whether acceptance goes further, with people also expressing a preference for such acts. In answering my second question, I will map the gap by analysing whether it exists only 'objectively' – people accept an act without knowing it is illegal (out of confusion) – or also 'subjectively' – where people knowingly accept an act beyond the law.

However, people are not legal experts and can thus get confused about the legal limits, considering legal something that is forbidden and illegal something that is allowed. My second step is thus to study the normative ideas sustaining approval and willingness for *eigenrichting*, because only by understanding these ideas can I determine with some certainty if approval and willingness to act beyond the law actually challenge the state's authority. My second question is thus: are the grounds people use to support approval, and the motives they give for their willingness to accept illegal acts, subversive or hegemonic? Grounds are the arguments people give in favour of the action of others and motives are the arguments people give to support their preference for one course of action over others. Those arguments are hegemonic or subversive according to their orientation with respect to legal principles. If the arguments are oriented by legal principles, they are hegemonic because they support the state centralizing force in society. If the arguments are incommensurable to legal principles, they will be subversive because they challenge the monopoly of the state over forceful means. After both studies, I will draw conclusions on the question of whether augmenting the legal space for citizen's arrest, according to the limits people establish, would endanger the authority of the state monopolizing force in society.

I will answer the question of whether the social ideas supporting broader limits for citizen's arrest than the laws currently in place endanger legal principles and the monopoly of the state, and I will offer some modest

proposals for bridging the gap between the living law and state law with respect to citizen law enforcement.

The structure of the book

The book is divided into eight chapters. This first chapter is an introduction to the research problem and the research questions.

The second chapter is a theoretical one, bringing in the main theories and concepts used in the research, such as the theory of self-help and the concepts of living law and legal consciousness in its various forms: hegemonic and subversive. My first hypothesis is that people accept *eigenrichting* out of confusion. In the responsibilisation climate, citizens might believe the legal limits for citizen law enforcement are broader than they are, thus they might approve of or express a willingness to carry out illegal reactions, unaware that they are beyond the legal limits. If I find this hypothesis confirmed, the gap would not endanger the rule of law because people are not wittingly contradicting legal standards. However, if I find that people accept reactions while aware of the fact that they exceed the legal constraints, I will have to take this as a sign of subversive support for *eigenrichting*. Citizens are not legal experts, however, so they might be mistaken in their understanding of where the legal limits are. We need, therefore, to know what underpins their understanding, why they put the limits where they do. In short, we need to know their arguments and understand their reasoning.

My second hypothesis is that people approving or expressing a willingness to act beyond the law, unaware (out of confusion) of the illegality of the acts they accept, do so on grounds and out of motives which can be called 'hegemonic'; while people approving or expressing a willingness to act beyond the law, while aware of the illegality of the acts they accept, will do so on grounds and out of motives which can be called 'subversive'. Motives and grounds are 'hegemonic' when they sustain the supremacy of the state in law enforcement and support principles recognized by state law even though they may give those principles a different meaning. Motives and grounds are 'subversive' when they defy the supremacy of the state in law enforcement and support principles that are incommensurable with those of state law.

The third chapter provides an account of the methodology applied in both fields, recounting first the previous research done in the legal and socio-legal fields around the topic of citizen law enforcement. Regarding the legal research methods, I explain how I use hermeneutic legal methodology and case studies to demarcate the legal space. Regarding the socio-legal research methods, I explain my use of qualitative methodology to reconstruct citizen's ideas of legality; I offer an account of the use of vignettes to contrast the legal with the social norms; and I explain the theoretical sampling for choosing respondents and the interviews to collect the data. I

will describe my use of the grounded theory method to analyse the interviews and produce the narratives to present results.

In Chapter four I study the legal norms enabling and constraining citizen law enforcement, explaining how the principles of proportionality, necessity and immediacy create the difference between legal and illegal citizen law enforcement.

In Chapter five I clarify the meaning of each of these principles in four selected cases. By doing so, I draw a clear line between (illegal) *eigenrichting* and (legal) citizen law enforcement in the cases.

In Chapter six I present the results of the first step of my empirical social research. I provide an account of the living law: the limits within which people are willing and approve of citizens effecting citizen law enforcement, and whether they are aware of accepting illegal acts as means for effecting citizen law enforcement. Here the gap between state law and the living law becomes visible.

As a second step, in Chapter seven my analysis of people's grounds and motives to support approval and willingness makes the gap understandable, as it shows how far people accept illegal acts out of confusion, oriented by legal principles which are hegemonic, or resist legal principles by using arguments incommensurable to the law.

The last chapter offers conclusions to the question of whether augmenting the legal space for citizen's arrest undermines the state's supremacy over forceful means – supported by legal principles – and offers proposals for bridging the gap.

II. The changing legality of citizen's arrest

Introduction

In this chapter I will introduce the set of theories I will use to describe and analyse the problem of different legalities for citizen's arrest. I have already observed in the introduction how in the Netherlands the legal space for citizens to make use of force against on-going crimes seems to be contested. Given widespread criminality and failures in the police and the criminal justice system, citizens are called upon to contribute and take a more active role in the business of law enforcement and crime prevention. Meanwhile, however, citizens overstep the legal limits, and their acts are often criminalized, though they claim to be acting within their rights, as in the cases studied for this research. The question is if, and to what extent, there is a gap between the limits in law and jurisprudence – which I will call state law – and those accepted in society, or in what I will call the living law. If this gap does indeed exist, how can it be explained?

The set of theories I introduce here provide the necessary concepts to describe and analyse the problem of the gap and explain it. I will describe Black's theory of self-help, signalling which conditions he proposes influence the occurrence of self-help. I will leave aside his considerations about the deterrence of self-help, or the ways in which the criminal justice system deals with it, because my research deals with definitions of legality for reactions, not with their control, and concentrates on the idea that acts of self-help are right in the eyes of those acting, though legal practitioners label them as criminal. I will also not observe Black's explanations for vengeance or rebellion (Black, 1993), as my research seeks to explain spontaneous reactions. To round up this sub-section, I will return to the central research questions and propose a series of diverging hypotheses derived from Black's theory.

Since Black does not provide elements to understand these contradictory images of 'legality' in acts of self-help, I will draw on Ehrlich's concept of the 'living law' (*lebendes Recht*). I will describe the different sorts of 'law' that Ehrlich finds living together in society. The concept of living law will help us to understand that there might be different images of legality for citizen's arrest, but this is insufficient to understand how these images diverge from each other. How can it be that the same act, accepted by citizens as rightful, is considered a crime by the law? This question is a concern of socio-legal theorists today when they study 'the gap' between living laws and state law. They use the concept of 'legal consciousness' to find an explanation. The concept is used to refer to the different normative ideas held in society. They are the stuff of which our ethical evaluations are made of, and they might conform to legal principles – called hegemonic legal consciousness (Ewick and Silbey, 1995) – or they might be counter-hegemonic or subversive to them. I will explore here the concept of legal consciousness in order to understand how it is constituted, what influences it and how it changes.

To finish this chapter I will return to my research questions to show how the theoretical approaches I introduce here are useful to answering these questions.

Black's theory of self-help

In the early 1980s the socio-legal theorist Donald Black proposed that *eigenrichting*, or as he called it, self-help, was one of many mechanisms people use to control undesirable behaviour. He gave an emblematic name to his article 'Crime as Social Control', and with it, he synthesized a paradox: self-help is a lawful means for people dealing with conflicts, and a crime for legal practitioners. In a later book, Black (1993) included his 'theory of self-help' within a major theoretical framework, where he sought to explain and predict people's use of different mechanisms to turn 'wrong' into 'right'. Self-help is special in that only the principals in a dispute take part: third parties, including hierarchical thirds, are excluded. Here, I focus on Black's

theory, attending to the definition of self-help and the explanation he offers for the phenomenon.

For Black, much conduct defined as criminal in modern society is in fact moralistic in character and resembles forms of conflict management present in societies without a legal system. Self-help is for Black the 'expression of a grievance through unilateral aggression' (Black, 1983:34), though it is frequently labelled as vandalism, assault or even homicide. Self-help can take place long after an offence, or it can be initiated as an immediate and spontaneous response to one. Common to all forms of self-help is however, that they seek to 'put things right', that the actor expresses disapproval of an act he considers unfair, causing harm in return. For Black, therefore, acts of self-help are loaded with normative evaluations. They express disapproval, whereby a concrete person is made responsible for a wrong. In harming the suspect, the wronged person intends to achieve restitution, compensation or punishment. Self-help is for Black one of many mechanisms people use to effect 'justice'. A particular feature of self-help is nonetheless that no legal officials intervene. In this form of conflict management, only the aggressor and victim take part, only the principals act, while 'the law' is absent (Black, 1993).[7]

Black remarks at the paradox that people acting in self-help pursue justice, even though their acts are defined as crimes by modern society. The modern state claims a monopoly over the legitimate use of force and centralizes the function of administering justice. The use of force by citizens is thus dissuaded, as self-help and the law are in permanent conflict. The question then is why if the state performs this central function in society, do people still take the law into their own hands?

Black's answer is that 'the state has only theoretically achieved the monopoly over the legitimate use of force' (Black, 1983:39). The law is absent from a great many settings in society, and legal protection is not uniformly available. The disputes of the poor, of members of ethnic minorities or teenagers are generally ignored by legal officials, who tend to trivialize their complaints, and when they intervene, often blame the complainant (Black, 1983). In general terms, for Black, people with low social status have serious difficulties in attracting legal protection, to the extent that they become distrustful of legal officials, avoiding and sometimes resisting the intervention of the law. In these social settings, self-help is accepted as a means for correcting deviant behaviour: acts of self-help are thus seen as fair. Black concludes that the phenomenon confirms the Hobbesian theory that without law, warfare prevails. Self-help is more likely to occur where the law is less available.

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[7] Black (1993) divides mechanisms for dealing with conflicts into two main groups: those where only the principals take part, and those involving third parties, or 'agents of settlement'. Self-help belongs to the first group.

Black's theory predicts that self-help increases to the extent that people lack access to the law. In other words, where police and the criminal justice system are seen as failing to provide legal assistance against crime, the acceptance of self-help will be prevalent. If the shortcomings of the police and criminal justice system, recognized through responsibilisation, are perceived as degrading legal protection, we would thus expect citizens to be more willing to turn to self-help.

Though helpful for conceptualizing and explaining self-help, Black's theory presents two shortcomings: first, it does not clarify the concept of 'access to law' and second, it does not provide the elements for understanding how two different ideas of 'legality' clash in self-help: an act is right to the person pursuing justice, while a crime to the justice system. I will address the problem of defining 'access to law' later, when defining the sample for my interviews. Here, I wish to attend to the problem of different legalities, turning to the concept of the 'living law'.

The law living in people

Ehrlich was the first socio-legal scientist who seriously challenged the positivist legal sciences in thought and practice (Cotterel, 1992). He developed theory and empirical research showing how the production of order in society and definitions of what is right and wrong could be only understood through adopting a wider scope than merely looking at the law created and applied by legal institutions. He put the epistemological question to the legal sciences: can we learn about the law governing people by looking only at the written law (Ehrlich, 1967a)? Because the norms for decision belonged to the world of the legal experts, they were applied and reproduced by them in cases of dispute, in the exceptional cases when solutions for those disputes were not found through the living law, and people turned to litigation.

The key question for Ehrlich was: what keeps societies together? He concluded that the 'inner pacific order' (Gurvitch, 1947:118) in communities could not be granted from above, but must be sustained as a necessity by individuals themselves, who followed living laws.

As a sociologist of law, Ehrlich (1967a)[8] observed with astonishment that parallel legal realities coexist: the laws people follow and those issued by the legislator. From his point of view, the rules followed in real life generally operate to prevent conflicts, and when conflicts appear, those rules help their resolution without recourse to state legal institutions. The rules issued

[8] Ehrlich's pioneering text: '*Die Erforschung des lebenden Rechts*' was originally published in 1911, containing the central issues of the teaching programme for his seminar on *Lebendes Recht* for the winter semester 1909/1910. The version of that text, used here, is the one republished in the book *Recht und Leben*, a compilation of Ehrlich's work, issued in 1967 by Manfred Rehbinder.

by the legislator were thus of little relevance to him, because they apply exceptionally when people are unable to settle conflicts on their own. One – the laws people follow – governed parental and societal relations, their property, their transactions, their physical movement or labour activities; the other – the law of the state – applied when the first failed to apply and people resorted to litigation.

The laws people follow, called the 'living law' (*lebendes Recht*) emanated from the people themselves. The laws prescribed by the legislator, called 'norms for decisions' (*Entscheidungsnormen*), emanated from the legal sciences.

For Ehrlich, the living law and norms for decisions rule in different domains and are expressed in different forms: the living law dominates social life, even though it is not based on written rules (1967a). Norms for decisions rule in the formal domain of legal institutions: they are written in legal codes, judicial decisions and statutory enactments. People carry the living law in their consciousness, it governs their actions and is the moral or ethical stuff of which people's evaluations and decisions are made. Ehrlich discovered that in fact, there are also multiple living laws in society, as different groups create and reproduce the norms valid within their groups. These norms enable interaction and life in community, because they guide action. However, they are as a matter of principle ignored by the legal sciences. As a rule, for Ehrlich, legal provisions and the threat of compulsion ordered by courts or their officials do not live in the mind of the people. People act and comply with certain standards out of habit: they do the right thing out of the conviction and the fear of the social consequences that deviation might bring. Norms for decisions, at the other extreme, are studied by the legal sciences but do not govern conduct, they are invoked only when people contravene the living laws and try to solve a dispute by resorting to litigation.

Ehrlich found that while living laws do sometimes correlate with norms for decision, they very often contradict them or are completely ignored by them. He was thereby arguing for a new epistemological perspective and a new area of concern in the legal sciences, which should through empirical study reveal traces of the law dominating life in the documentary laws people subscribe to and the customs people observe (Ehrlich, 1967b).

Ehrlich's ideas about the living law were strongly criticized in his time by legal positivists and they were long neglected in European socio-legal theory. His ideas nevertheless found more fertile terrain in American sociological jurisprudence, where Roscoe Pound translated part of his oeuvre in 1913 and used Ehrlich's ideas to develop his own distinction between the 'law in the books' and the 'law in action'. Roscoe Pound was a precursor of a new tradition of thought in legal sciences, known later as American legal realism.

Both Ehrlich and Pound were equally concerned with the causal relationship between law and social reality (how can the law influence social life?), and they were both driven by a conviction of the benefits of using empirical research to solve legal engineering problems. Pound nevertheless went further along the 'instrumental' path of the law than Ehrlich (Nelken, 1984). Pound was mainly concerned with the contradictions arising within state law: the dichotomy between the rules contained in legal provisions ('law in the books') and the law produced by judges and other legal practitioners when they applied it ('law in action'). Law in action very often differs from the former, and the problem is that the laws in action are actually those affecting social life. Pound retook Ehrlich's ideas, but concerned about the effects of legislation, his research programme chose to target creating understanding of the living law and the law in action to provide a way of measuring the effectiveness of legal provisions. He thereby produced an amalgamation of his own and Ehrlich's ideas, which greatly influenced later socio-legal theory (Tamanaha, 2001).

Ehrlich did not explain how this living law is produced or how it changes. This is a question of relevance to the understanding of why the living law departs from state law in cases of citizen's arrest. Pound, for his part, did not answer how state law could keep track of changes in the living law without deviating from its principles. This is also of importance here, since I wish to make a contribution to bridging the gap in the area of citizen's arrest. Moreover, this is a concern of legal theorists and sociologists of law, who have attempted to discover what creates and influences people's legal consciousness.

The empirical study of the legal consciousness

Legal realists began to explore empirically the consequences of implementing state law. They believed, just as Pound did, that the ineffectiveness of laws related to a gap between state law and the law in action: accordingly, altering the books through legislation would contribute to effective regulations (Tamanaha, 1995). By the mid twentieth century, studies documenting the gap were showing two important things that produced a reorientation in research: first, that laws – instead of effectively achieving certain goals, such as equal treatment – sustain and reproduce structures of power and inequality in society. Second, that despite this ineffectiveness, they retain support among the people, who continue to sustain the 'myth of rights' (Silbey, 2005).

As a consequence, since the 1960s 'law and society' scholars have begun to study 'how does law matter' in the lives of people (Garath and Sarat, 1998). Researchers have looked since then in different directions: some have searched for the instrumental value of law, while others for its constitutive value. The instrumental approach looks for the effects of laws and legal reforms, giving rise to abundant research seeking to establish, for instance, the relationship between popular beliefs in due process and the legitimacy

of the law, or knowing how people's legal knowledge impacts on their perceptions of the legal system and when they resort to law in their disputes (Engel, 1998). The constitutive approach searches for the role that laws play in structuring 'understanding', or the normative meaning of human action. Researchers within this strand observe how differing understandings of the law and terminology constitute people's interpretations and the meaning they assign to events in daily life. They call these concepts and terminology 'legal consciousness'.

The first instrumental research strand mainly employs quantitative research methods, while legal consciousness research engages almost exclusively in qualitative research.

This second strand of research in law and society interests me because I want to establish empirically if the living law is consistent (whether there is a gap) with the state law of citizen's arrest. Given that it is not, and that the gap exists, I want to understand how it is bridged. To understand it, the concept of legal consciousness is important.

Trubek (1984:592) provides one of the earliest definitions of legal consciousness, explaining: 'all the ideas about the nature, function and operation of the law held by anyone in society'. Legal consciousness, following his definition, could be found in legal doctrine as much as in the evaluations of any lay person. To Trubek, the legal consciousness of a society is a 'set of world views, on basic (and sometimes implicit) notions about what is natural, necessary, just and desirable'. These notions or world views lie behind all the arguments we use to justify or give meaning to social events or relationships.

Different expressions of legal consciousness exist side-by-side in society, because they rest on different ethical structures or 'ideologies' through which persons with different backgrounds interpret events. For example, an insult can be perceived as an act of racist or sexist discrimination, as an attack against honour, or as the irresponsible act of a drunken person. Each of these interpretations is backed by a different set of ethical ideas that are used to explain, justify and give meaning to the same event, and each of them leads to different judgements and reactions. To Trubek (1984), these different ethical ideas are like 'doctrines' that people apply in diverse contexts. In fact, he asserts, 'legal doctrines' are expressions of those ideas in the legal world.

Merry, in her own empirical research (1990), uses the term legal consciousness as '[t]he ways people understand and use law'. To her, legal consciousness is a discourse, which as 'every discourse contains a more or less coherent set of categories, and a theory of action: a vocabulary for naming events and persons, and a theory for explaining actions and relationships' (Merry, 1990:110). To Silbey (2005), the study of legal consciousness 'is the search for the forms of participation and interpretation

through which actors construct, sustain, reproduce or amend the circulating structures of meaning concerning law' (Silbey, 2005: 334). To both, hence, people's legal consciousness consists of the ideas circulating in society about what is legal and when a person may employ the law, as this creates what 'the law' means in society. However, these ideas are not necessarily independent of the law itself.

For Merry and Silbey, legal consciousness is 'constituted' by legal terminology and principles, but not everybody applies equal principles. People use different schemes or 'doctrines' to interpret and understand events, and according to them, categorize actions, people, etc. However, if 'the law' constitutes all these doctrines, how could they be different, where do these different doctrines come from, and how do they change? For some time, researchers have believed that they depend mainly on the social characteristics of individuals, on their education, economic position, age, ethnic origin and so forth. These questions have led the agenda of legal consciousness research up to the present.

Other research shows that legal consciousness depends on individuals' own perceptions and experiences, whereby it does not always reproduce legal principles, going as far as also contradicting the standards of state law, even creating new forms of legality (Ewick and Silbey, 1995; 1998; Tamanaha, 2001). This is how 'the gap' between the living law and state law that Ehrlich so clearly described, opens: when people create a new legality. I am interested in explaining this. Why does it happen?

Recent legal theorists discovered that the legal consciousness of people changes with time and people's experiences, as it is influenced by the way problems are addressed in society (Sarat, 1990; Engel, 1998). Some forms of legal consciousness disappear or lose their meaning with time, others are, at certain moments, more popular than others, and often they are just the different 'styles' (Hertogh, 2006) of reasoning that people apply. Legal consciousness backed by religious values could be a good example of this.

Legal consciousness is thus socially and historically produced and diverse in a given society.

The question remaining here, nevertheless, is when is the living law 'constituted' or oriented by legal principles, and when is it not?

Ewick and Silbey speak of 'hegemonic' or 'subversive' legal consciousness, distinguished according to their normative foundations. Hegemonic is the legal consciousness that contains normative ideas which sustain and reproduce established rights and structures of power (1998:225). This is true when they hold unquestioned the image of an almighty and impartial law, or when they support, for instance, that the state is 'the' law enforcer in society. Subversive, or counter-hegemonic, is the legal consciousness

containing ideas incommensurable to state law, resisting and creating standards in conflict with it.

According to Ewick and Silbey (1995; 1998), legal consciousness, because it consists of the values people adhere to, can be found in the reconstructions people make of events and the arguments they offer in narratives. Those narratives become the window through which one can explore the normative basis of the living law.

From a socio-legal perspective, therefore, to determine whether there is legal alienation or subversion, we need to discover the normative ideas lying behind what people approve of, because subversion means contradiction at the normative level. Hegemony or subversion thus depend not on what people accept, or where they set their limits between 'right and wrong', but on the normative ideas they employ to set those limits.

This understanding is of major importance for my research, because when from a legal perspective the support for illegal forms of citizen law enforcement is in itself subversive, from a socio-legal point of view this depends on the norms sustaining that support.

Let us now reconsider my research questions, to re-examine them in the light of the body of theory and concepts presented.

Back to my research questions

The social debate aroused in the Netherlands on the criminal prosecution of citizens who had arrested criminal suspects indicates that a gap has opened between the living law and state law for citizen law enforcement. During this period of responsibilisation, when citizens are called on to be a link in 'a chain' of actors in the enforcement of laws, the space within which they can act becomes vague. The jurisprudence signals that the legal limits have stretched a bit in case-law, particularly for self-defence, but remain dissuasive rather than encouraging citizens to act (Knigge, 2002). It is thus unsurprising that it is not only unclear to citizens what the state expects from them in acute unsafe situations, but also what they may or may not do in such situations (SMVP, 2007). De Roos (2000) speaks of 'confusion', citizens do not know the limits, thus they accept illegal acts, unaware of that fact. Others, mainly in the political milieu, demand augmentation of the legal space for citizens to act in law enforcement, to make it consistent with the greater acceptance self-help has in society (Trouw, 21.06.03:4). Jurists for their part, warn of the risks of weakening the rule of law (*Rechtsstaat*), by giving vent to violence (Knigge, 2002).

This debate is central to this research because I intend to contribute to it by offering some proposals for how the state law could engage with the living law. On the basis of my research, I intend to assess whether the legal space for citizen's arrest can be enlarged without endangering the rule of law.

Before being able to make such proposals, however, I will have to answer two questions.

1. Does the living law knowingly approve of illegal acts of citizen's arrest?

Following Ehrlich, the living law might or might not correlate with 'norms for decisions', it could remain within or go beyond legal limits. I will perform empirical research to discover whether the living law approves of illegal acts. If it does, I will confirm that 'the gap' does indeed exist. Moreover, in a period of responsibilisation – during which citizens are encouraged to take part in the enforcement of the law while simultaneous legal limits attempt to dissuade the same activity – it is easy to arrive at the expectation that citizens will be easily confused, accepting acts which are in fact illegal.

My first hypothesis here is that citizens are accepting citizen's arrests beyond the law out of confusion. Confusion creates uncertainty about the meaning (in this case, the legality) of acts of citizen's arrest. This hypothesis will be confirmed if my respondents approve of and express willingness to act beyond the law, unaware that the acts they accept are in fact illegal. If this is the case, this form of approval and/or willingness would not necessarily be subversive to the rule of law. On the contrary, if respondents approve of and express willingness to act beyond the law while aware of its illegality, the confusion hypothesis would be refuted, indicating that people may indeed have acquired a subversive stance with respect to the rule of law.

However, citizens are actually unaware of where the legal limits are, because they are not legal experts. Therefore, knowing where citizens locate the limits is not enough to know for certain whether their legal consciousness is subversive or hegemonic with respect to the rule of law. We need to go a step further. Following socio-legal theory, we need to reach the people's normative ideas, their 'legal consciousness', to establish whether this is oriented by legal principles. My second question is hence:

2. Is the living law beyond the law based on subversive or hegemonic legal consciousness?

According to socio-legal theory, the legal consciousness consists of the values people internalize, and to uncover them it does not suffice to know where people set their limits, but why they locate them there. To know that, we need to determine the arguments people employ to explain their limits, which I will discover by analysing the grounds respondents provide for approval and the motives they express for being willing to act beyond the law.

My second hypothesis is that people who approve of and express willingness to act beyond the law while unaware that they accept illegal acts, base this on hegemonic grounds and motives, while those who approve

of and express willingness to act beyond the law while aware of the illegality of what they accept, do so on subversive grounds and motives. This could be because people who accept acts, unaware that they are illegal, are not questioning the law itself, they are just confused about its meaning, ascribing an interpretation to the law different from the one judges do. On the contrary, those who accept acts, aware of their illegality, appear to bluntly disagree with the law in itself.

My second hypothesis will be confirmed if I find that respondents, confused about the law's limits, go beyond the law using hegemonic grounds and motives. This would mean that they interpret legal principles more permissively than judges do. The hypothesis will also be confirmed if respondents, aware of the illegal character of the acts they approve of or are willing to do, use subversive grounds and motives. This would mean they put forward normative ideas incommensurable to legal principles.

To determine this, I have to analyse the respondents' arguments. Once I understand their legal consciousness, I will be able to conclude on the question of whether enlarging the space for citizen's arrest, according to the 'living law', could be achieved without endangering the rule of law. In other words, by looking for the social limits to citizen law enforcement and the legal consciousness lying behind them, this research should show not only what people accept or are willing to do beyond the law, but also the normative ideas sustaining it. Knowing this, we will be able to understand how the gap between the living law and state law is opened, which kind of normative ideas create the gap. Then we will be able to assess how to bridge that gap. If legal consciousness is oriented by legal principles, we will be able to contribute to the debate in the Netherlands by revealing in which direction criminal law could develop without endangering civil rights and liberties.

We saw that legal consciousness research has so far approached two different questions. One line of research, described by Hertogh (2004) as the 'European' tradition of legal consciousness research, seeks to find the rules that govern people, the living law for selected socio-legal problems. The other, called the 'constitutive American' tradition, seeks to discover how far state law is consistent with people's legal consciousness, and vice versa: how far is the legal consciousness of people constituted by state law.

My research involves both traditions: the European tradition, insofar as it seeks to discover and describe the social definitions of legality[9] (the living law) for citizen's arrest, to establish if a gap exists; and the American tradition, when it explores whether the legal consciousness is constituted or oriented by principles of state law, or by principles alien to it.

[9] I use the term 'legality' as Ewick and Silbey (1998:22) do, referring to the meanings recognised as legal.

However, the first step is to discover whether a gap really exists between the living law and state law, and to do this, I need to perform legal and socio-legal research. The legal research has to delineate the legal space for citizen law enforcement and citizen's arrest. With the legal limits visible, I can perform socio-legal research to delineate the social space, contrasting the two. Then the gap, if present, will become visible and I will be able to explore further whether the arguments creating it in the social sphere are hegemonic or subversive.

In the following pages we will see how I intend to measure the gap, if it exists, and to explore its meaning.

III. Research design and methods

Introduction

This study is divided into two parts: a legal and a socio-legal one. Both parts are necessary to be able to compare the space state law enables (the legal space) with the space the living law enables (the social space) for citizen's arrest, in order to determine whether there is a gap between them. Both studies are also necessary because to draw conclusions about how to bridge that gap, I need to know if respondents' legal consciousness is commensurable (hegemonic) or incommensurable (subversive) to the rule of law. To reach that far, I have to explore the normative ideas underpinning both the social and legal limits to citizen's arrest, to contrast them. However, knowing the limits that the law establishes is easier than knowing the limits that citizens accept. With legal research I will sketch out the legal space, showing how the norms constrain and enable citizens to use force for law enforcement, and make the limits visible in concrete paradigmatic cases. Along the way, I will also extract the normative criteria the law applies. The limits I draw and the normative criteria I extract from the law will help me to explore peoples' legal consciousness through interviewing respondents. From legal research I need, therefore, a basis for comparison and exploration, which I will have obtained successfully once I know the concrete legal limits established in concrete cases, and understand how legal principles apply to them.

In this chapter, I will start with a brief exposition of the methods of legal analysis that I used. This will be followed by a short explanation of the research design and methods I applied in the socio-legal part of my research. Each part begins with a section in which I will consider how citizen's arrest and more broadly, citizen law enforcement, has been dealt with in previous legal and socio-legal research. As we will see, the topic of citizen's arrest and law enforcement is rather marginally approached in both criminal law and jurisprudence, as well as in socio-legal research (De Roos, 2000). Nevertheless, there are a small number of studies worth reviewing to see to what extent this study can be built on their results. The

chapter ends with a section in which I discuss the methods for data analysis and for presentation of the results.

The Legal Research Methods

Citizen law enforcement in legal research

Previous legal research into this topic has tried to elucidate when citizens commit a crime or contrarily, when they act with justification (*rechtvaardiging*) or authority (*bevoegdheid*) when enforcing the law. Knigge and De Jong (2003:168) state that citizens are in principle allowed to enforce the law as long as they do not themselves commit a crime, e.g. by causing harm. These authors have studied the law (substantial and procedural criminal law) in order to specify the conditions under which citizens will not be punished when causing harm in the course of citizen law enforcement. They specify the legal norms authorizing (as in cases of citizen's arrest) or justifying harmful acts (as in cases of self-defence). Over time, criminal law doctrine has developed principles for interpreting these norms. This is the jurisprudence that courts apply when they judge concrete cases of citizen law enforcement. Hazewinkel-Suringa (1994) and De Hullu (2012), among others, agree that citizens should not be punished when their actions or reactions are 'proportionate', 'necessary' and 'immediate' to the aggression or threat. However, their legal research does not draw a clear line between lawful and unlawful citizen law enforcement, because they analyse and explain general principles. No concrete line is drawn, because this is the competence of judges when considering the facts and circumstances of a case.

A number of legal authors concentrated on another question: whether *eigenrichting* is legal or not. Van Wifferen (2003) and Kelk (2005) reuse the old Dutch term *eigenrichting* to define it as an action where citizens, trying to enforce rights or reacting to crimes, transgress legal limits. Both authors emphasize that limits are overstepped: *eigenrichting* rebels against the state's central authority and is illegal. De Waard (1984) and De Roos (2000) also refer to this aspect, though accenting another idea: to them, *eigenrichting* actually embodies a clash between different normative visions – that of the state and that of a citizen. For De Roos (2000:307), it is 'the violation of enforceable criminal norms as a consequence of citizen's own value perceptions, appraisals or interests'. This strand of research refers to the legal nature of *eigenrichting* and the fact that citizens and the law can have contrasting perceptions about what is acceptable in concrete cases. However, it does not answer the question of how or why these normative ideas endanger the authority of the state.

The questions guiding my legal research are: 1. which are the norms constraining citizen law enforcement; and 2. which are the norms enabling citizen law enforcement?

To answer them, first I will study state law: the law in the books, case law and jurisprudence. I will explore the meaning of laws, looking at their terms (exegesis) and the interpretations the doctrine applies to them. I systematically analyse the norms, extracting and studying the main principles developed by the jurisprudence which, enriched by case law, are applied to judge cases. These principles contain the normative ideas, the rationale that judges use in their arguments when forming decisions. Parallel to this, I select four emblematic criminal cases where a legal decision was taken. I will study them to elucidate how they draw the line between lawful and unlawful citizen law enforcement. Beyond drawing the line, the study will picture the normative ideas the courts apply when they interpret the law in their decisions. Each case clarifies the meaning of legal principles in four controversial aspects. These cases are used later to compare the limits accepted in society and the normative ideas sustaining them.

The legal methods applied help me delineate the legal space for citizen law enforcement. Legal research has as a first aim, an operative sense: I wanted to obtain a basis for comparison and exploration of the living law. This concrete basis should draw a clear line between legal and illegal citizen law enforcement, something that should help me – with the aid of socio-legal research – to reveal if there is indeed a gap between state law and the living law. If the gap exists, legal research should provide me with the legal criteria necessary to analyse peoples' legal consciousness and conclude how the gap between both could be bridged. Having gained an understanding of the rationale to the norms and principles of state law, I will be able to establish if citizens' legal consciousness is based on ideas incommensurable to the 'rule of law', and assess whether augmenting the legal space for citizen law enforcement is acceptable to the Dutch legal system. The legal study was thus planned to be descriptive (*beschrijvend*) – coherent in its own right – because it is intended to clarify the current state of affairs in citizen law enforcement. However, read with the socio-legal study, it should become a conceptual (*ontwerpend*) work (Van Gestel and Vranken, 2007), able to yield proposals for bridging the gap.

Achieving this goal thus requires the application of different scopes in legal research. Why different scopes? First, I needed a 'theoretical' scope to understand legal norms and principles in their systemic functioning: this should enable me to handle the rationale, the arguments that courts apply in concrete cases, understanding that when they decide, they create coherence within the system of the rule of law. I also needed an 'empirical' scope, to analyse how legal principles apply in the four concrete cases I have also studied.

The methodology of my legal study was in general terms 'hermeneutic' (Korrel and Kamstra, 1991). It was hermeneutic because it aimed at understanding (in the sense of '*Verstehen*') the logic of norms, thus understanding within the frame of reference of a system of meaning known

as the 'rule of law'. Hermeneutic study consists of interpreting the meaning of something, whereby the interpretation has to respond to a system that gives meaning to it (Herweijer, 2003). This methodology was necessary because every legal norm belongs to a more or less coherent system of norms, all seeking to regulate conduct. My work thus consisted of looking for the meaning of the law, where my understanding had to be 'consistent' within the whole system (Stolker, 2003). In this sense, an important part of the legal research consisted of finding interrelationships, bringing order to questions and answers, filling blanks and finding inconsistencies in norms and court decisions.

I organized my 'theoretical' legal study to answer two clear questions: 1. which are the norms constraining citizen law enforcement? and 2. which are the norms enabling citizen law enforcement?

Answering these questions consisted mainly in a hermeneutic exercise. However, this hermeneutic exercise did not end at an abstract level; I had to make sense of legal decisions in concrete cases as well, analysing the concrete legal problems present in them. In my mind, I had to adopt the perspective of a judge, trying at once to approach and distance myself from the case and the decision of the actual judge. In one case, moreover – the case of the handbag snatching – I had to play the role of the judge myself, in foreseeing how the court could decide, and the forms of reasoning it could apply, because the case had not yet been decided at the time that I analysed my interviews.

In newspapers and articles I read frequently that *eigenrichting* was forbidden by law, thus as a first step, I tried to understand the historical evolution of this prohibition, and to discover how it got anchored in the Dutch legal system. To my surprise, after a brief historical investigation I found out that there was no concrete legal provision on the matter: the norms and principles provided for the unwritten proscription of *eigenrichting*. Norms endow specific institutions with the function of enforcing the law. In the modern Dutch state, public servants are allowed to use physical force or otherwise restrict civil liberties in enforcing laws: they can make arrests and bring suspects before a judge. Citizens are in principle excluded from such activity. I thus collected and ordered the norms allocating the responsibility for law enforcement to different agencies and interpreted them, performing exegetic, historical and systematic analysis. To do so, I resorted to different sources, such as substantive and procedural laws, legislative debates, the jurisprudence and case law.

I learned at that time that in principle, citizens are not permitted to enforce the law because that is the preserve of public agents. If they strike, shoot or catch someone, if they lock someone up, they commit a crime. However, I also learned that there are exceptional circumstances under which citizens can do these things. I understood that the kernel was the legality principle, anchored in the constitution, known also as the 'rule of law': civil rights and

liberties cannot be affected without legal permission: certain legal agents have a general permission to do so, citizens only under specific circumstances. A person who affects rights without permission commits a crime.

The second step of the legal research thus meant determining those specific circumstances, searching for the norms which enable citizen law enforcement.

Through studying legal doctrine and the law, I knew that citizen law enforcement is permitted by certain norms justifying, excusing or giving authority to citizens to affect rights, such as in cases of self-defence, *force majeure* or to arrest someone. I collected, ordered and described these norms. I then performed an exegetic analysis of them, looking at the meaning of the different legal terms and categories contained in those norms. It became evident that all these norms establish limits that the jurisprudence translates into three principles. They are used to evaluate the concrete reactions of citizens and to decide whether an act is punishable or not. Reactions have to produce 'proportionate' harm to be justified, and the means used must be 'necessary'. Therefore, citizens cannot use means more harmful than strictly necessary. The same was true with respect to the time an action is performed: only immediate harm against aggression is acceptable; neither revenge, nor preventive attacks are allowed. I studied these principles in the jurisprudence to discover their scope and to precisely identify the situations to which they apply (Stolker, 2003:771), and also performed a historical analysis (Korrel and Kamstra, 1991). Since the law is not a static but a contingent system. I looked at the goals the legislator proposed for them at the time they were discussed, and the changes in interpretation they endured as they were applied in the case law. To do so, I resorted to various sources, such as case law, jurisprudence, parliamentary debates and legal texts.

My legal research gave me the basis for comparison and exploration (the operative goal), but until that point I had only described the methods I used to 'interpret' the law and to understand the rationales judges apply when they decide cases. I then needed to explain how I produced the instruments I used to compare state law with the living law, and to explore the rationales people apply when they decide what is acceptable, and what is not.

The selection and study of the legal cases

Knowing the norms and principles which delineate in 'theory' the legal space for citizen law enforcement, I needed to shed 'empirical' light on its limits. I looked for a few cases that had been through the courts that were 'emblematic' in the sense that they had to embody concrete problematic points of state law. The points in question were problematic because they were contested in the responsibilisation climate, and were under an on-going process of redefinition by the jurisprudence and case law.

The legal research revealed early on that these points related to the application of principles of proportionality, necessity and immediacy. The cases thus had to fulfil the following requirements: they had to illustrate a situation where a citizen reacted to an on-going crime using physical force. They had to present a single 'problematic' aspect, either because disproportionate harm was caused, the means employed were unnecessarily drastic, or the reactions were apparently not immediate, either because they began too late or too early. The events also had to have occurred in publicly accessible places.[10] Finally, because I wanted to explore common-sense ideas about the limits to citizen law enforcement in my socio-legal research, I searched for cases that also attracted public concern.

On the basis of these criteria, I applied four different strategies to finding cases. I searched on a newspaper database, I requested the collaboration of Groningen's district judges, I searched in the website of the Dutch Public Prosecution Service and in the specialized literature.

I searched the LexisNexis news database, employing various search-terms and periods alternately. I restricted my searches to four of the best-selling Dutch newspapers: De Telegraaf, De Trouw, Het Volkskrant and NRC Handelsblad. I looked for cases containing the terms '*eigenrichting*', '*geweld*' (violence) and '*openlijk*' (public) or a combination of terms such as '*burger*' (citizen), '*aanhouden*' (to apprehend), '*aanpakken*' (to catch), '*dader*' (perpetrator), or '*overvaller*' (robber). I first searched in the period 01.01.1999 to 01.31.2001, later broadened to the period 01.01.1999 to 12.16.2004. The reason for restricting the search to these periods was that I was looking for cases that were likely to have reached a final court decision by the time I studied them in the socio-legal research.

I also contacted members of the district courts. They agreed to circulate a letter to other district judges from the same province asking them to provide information about cases fulfilling the criteria I was searching for. Finally, I searched the website of the National Public Prosecution Service, where a special heading '*Eigenhandig optreden*'[11] aggregates cases where citizens have arrested suspects, and I also searched in the specialized literature. The search yielded a great many cases, which for practical reasons had to be shortened. I selected on the basis of the public resonance they achieved and how interesting the legal problems they presented were. As a result, four cases were selected for study. Of the four selected cases, three had received a final court decision before April 2006, meaning that I could ask for access to the case files. One case (the one about the handbag snatching) appeared in the papers while I was searching for cases and had

[10] I mean cases which occur either in public spaces, such as parks, or private spaces with public access such as shops, supermarkets, etc.

[11] In criminal law the term refers to the legal category of 'citizen's arrest', and literally translated it means 'independent action'.

not been decided at the time the interviews were conducted. It was, therefore, impossible to access its case files, but the court decision was published later on. The Board of the Prosecutor-General allowed me access to the files from the rest of the cases. This permitted me to directly study the files, which I did between September and October 2006. The case of the handbag snatching was studied on the basis of the information which appeared in the press.

The cases were studied by analysing their relevant facts, to assess the norms applying to them. To that end, I began by collecting and ordering the arguments brought by the different parties in the case, but also by performing my own systematic interpretation, searching critically for the principles and norms that could apply.

These cases were later used to construct the vignettes to study the social space for citizen law enforcement.

The Socio-legal Research Methods

Citizen law enforcement in socio-legal research

Haeder and Klein (2002) interviewed 3500 respondents in a quantitative research project seeking to gather opinions about the limits the law and court decisions establish for self-defence. These researchers wanted to discover whether public opinion was consistent with the legal assessment made in concrete cases of self-defence. They used vignettes for the interviews, which are descriptions of situations developed from real cases, most of which had also previously been considered by the courts. The research shows that there is a gap between legal and public opinion on the limits of citizen law enforcement, and that the views of the respondents only exceptionally coincide with the decisions of the judges. According to the researchers, respondents weigh the relative benefits of a reaction to assess whether it was acceptable. Respondents also consider the balance of strength or power between perpetrator and victim to approve or disapprove of reactions. A limitation of this kind of survey-research is, however, that respondents are asked about concrete and single-issue questions in cases representing complex legal problems. The methodology applied required, thus, an over-simplification of those legal problems.

Haas (2010) uses a different method. She wanted to discover how features of the aggression against which a citizen reacts, along with trust in the criminal justice system and sensitivity to crime, determine social support for vigilantism. She sought to discover the relative importance of these features in relation to perceptions of the legitimacy of the criminal justice system and people's concern when confronted with a crime problem.

Like me, she used vignettes, finding that public support for vigilantism does not simply depend on the perception of legitimacy of the legal system. More

acutely, it depends on the seriousness of the aggression, and the lack of punishment for its perpetrator. An interesting finding is, moreover, that there are different forms of support for vigilantism: a person can show empathy for the perpetrator but still consider that he must be punished.

In her most recent work, Haas (2011) focused on the influence of trust in judges. Relying again on vignettes, she measured the impact of people's understanding of the work of judges in their support of *eigenrichting*, reappraising the relative importance of trust in judges. She finds again that certain features in cases are more important than trust in judges, as support varies more strongly along the line of circumstantial variation in cases rather than on a judge's trustworthiness. A limitation of these studies is, however, that the arguments people have for support remain invisible, and the nuances among them were not caught by her methodology.

Previous socio-legal research shows that vignettes constructed on the basis of legal cases are effective instruments for comparing legal and social limits. However, because surveys demand the use of concrete and single-issue questions, the survey methodology is too limited to embrace the complexity of the legal problems presented in cases. On the other hand, surveys are incapable of eliciting arguments, and those arguments communicate the normative ideas people apply to decide what is acceptable. These are the normative ideas I need to gain access to in order to answer my research question.

The questions directing my socio-legal research are: 1. Are citizens approving and expressing willingness to commit acts while aware or unaware that they are illegal? 2. Is this approval and willingness subversive or hegemonic to the rule of law?

I will answer these questions in two steps. The first step is to find out if citizens approve of and are willing to commit acts beyond the limits of the law, and how far they are aware or unaware of crossing them. I use the cases studied in the legal research to construct vignettes, and the vignettes to question respondents. By doing so, I map the social space for citizen law enforcement. If the respondents turn out to approve or express a willingness to act beyond the law, I will analyse the interviews to determine whether they did it out of confusion. My first hypothesis is that people accept acting beyond the limits of the law because in the responsibilisation climate, they do not know its limits. Confusion can be inferred from narratives in which the respondents report that they approve of or express a willingness to undertake reactions, while unaware of the fact that they transgress legal limits. In these cases we infer that the respondents are oblivious to the legal limits of citizen's arrest. In contrast, if they were aware, they would accept reactions despite knowing about legal constraints.

The second step is to analyse the interviews to determine the extent to which the grounds and motives for approval and willingness to act beyond

legal limits are subversive or hegemonic. My second hypothesis was that people approving of or expressing a willingness to act beyond legal limits while unaware of the illegality of the acts they accept, do this on hegemonic grounds and motives. On the other hand, those who knowingly approve of or express a willingness to act beyond legal limits, do this based on subversive grounds and motives.

Proportionality, necessity and temporal aspects are of importance in the legal sphere, but people were unable to explain what these limits mean concretely during the interviews. Hence, we do not know what respondents would have approved of or been willing to do, had they known the legal limits as judges establish them. I need to reach the normative ideas underpinning approval and willingness and I will achieve this by analysing the grounds and the motives they put forward. As a second step, therefore, I will analyse all the grounds and motives expressed by people who approve of or express a willingness to act beyond the law, both knowingly and through confusion about the illegal character of the acts they approve of or are willing to do.

This will allow me to answer the research questions by establishing whether there is a gap between state law and the living law, and conclude how far augmenting the legal space for citizen's arrest according to the living law undermines the state monopoly of violence as it endangers public order.

Qualitative methodology

Answering my research questions required a methodology that would help me in two ways. First, I needed it to help me explore the limits citizens set for citizen law enforcement and to contrast them with those of state law (to determine the gap). Second, I needed it to help me uncover the legal consciousness, i.e. the normative ideas citizens apply to set limits to the acts of others as well as their own and to contrast them with the legal rationale judges applied in concrete cases. This methodology has to offer data gathering methods capable of eliciting reflection and argumentation from respondents, and to go in depth into the reasons why they consider certain acts acceptable for themselves and others. Qualitative methodology appeared to be the most suitable.

Qualitative methodology's main concern is with understanding how we give meaning to our social world (Gubrium and Holstein, 2000). This includes understanding the meaning of what we and other people do, but also how the meaning we create is shaped in our interactions. In this study I want to discover why citizens approve of something the law considers 'illegal', not on the basis that something 'is' illegal, but that something is 'defined' or understood as illegal. In doing so, this research adopts part of the interpretative paradigm of social research (Böttger, 1996), because far from assuming there are ontological characteristics in acts that make them 'illegal', it assumes they are the result of social processes which give them that meaning (Meuser, 2003). In my socio-legal study I will try to make that

process visible by studying the arguments people offer to signify that acts are acceptable, despite state law condemning them.

This can be done only by employing research instruments that enable exploration and contrast: the exploration of peoples' ideas of legality, and contrasting those ideas with the limits and rationale of state law. To do so, I chose vignettes. Vignettes, as we will now see, encourage people to express their own normative ideas in the context of real cases, for which judges have already established legal limits.

Vignettes

The vignette is a technique for conducting empirical social research, whose central feature is to explore participants' beliefs. They consist of short scenarios or stories, in written or pictorial form, upon which participants are required to comment (Jenkins et al., 2010).

Vignettes are often used for the clarification of individual judgements and personal preferences, often in relation to moral dilemmas (Kohler Riessman, 1993). I therefore used them too.

To discover whether there is a gap between the living law and state law, and to explore the normative ideas within that gap, I needed research instruments that facilitate the contrast of legality in both realms, stimulating evaluations in respondents. Vignettes appeared to be the most fitting technique.

My respondents were presented with four different scenarios about which they were encouraged to reflect, evaluate and express their thoughts in narratives. Each of these written scenarios or vignettes, describes one of the four criminal cases I studied in my legal research.

Each case was 'digested' in order to illustrate a single central legal and normative problem coherently. This means that aspects of the case that had the potential to cause respondents to consider a parallel problem were left out of the vignette. The vignettes provided, however, enough contextual information for respondents to get a good impression of the situation.

The format of the story (Barter and Renold, 1999) was specially constructed. The vignettes described the evolution of events clearly, and the plot introduced the moral dilemmas respondents had to solve step by step. The vignettes were thus structured with a variable number of facets or steps, where each step contained a description in short and straightforward sentences.

The vignettes were expected to elicit various views from the respondents: what they would have been willing themselves to do and their evaluations of what others did. To do so, the first step in the vignettes depicted the context in which an act of aggression took place in the present tense. This

step described the wronged person and the suspect (relevant characteristics) along with extra contextual information about the value of stolen things, the time and place of the aggression, etc. Immediately after this first step, the respondents were asked to speculate about what they would have done in such a situation. There followed a piecemeal description of what happened next, the reactions of the 'real actors' in the criminal cases, while the respondents were asked to evaluate, judge and offer arguments about what was done.

Respondents were encouraged to provide explanations through various questioning techniques such as paraphrasing, making comparisons, and going back and forth in their reasoning. The goal here was to discover the different ideas of legality respondents have around four concrete topics.

Topics

Each vignette depicted a single central moral dilemma. Each represented one of four concrete topics on the limits to citizen law enforcement recurrently under discussion in the criminal law and in public debate.

Through the legal study, I established that in cases where citizens effect arrest, judges consider the applicability of various legal categories. First, they consider whether the act responds to the requirements of the procedural authority for citizen's arrest (Art. 53 Sv), which enables citizens to apprehend a suspect discovered in *flagrante delicto*. However, it is possible, for instance, that during an arrest the suspect resists arrest and also reacts against the arresting citizen using force. If the arresting citizen, confronting that reaction, causes harm to the suspect, third persons or material propriety, other legal categories could enter the judge's deliberations. Judges could be required to evaluate whether so-called defences-justifications or excuses, such as self-defence (Art. 41,1 Sr), *force majeure* (Art. 40 Sr), the improper use of the self-defence (Art. 41,2 Sr), etc. are applicable.

Whether looking at the application of the legal category of citizen's arrest, defences-justification or excuses, judges deliberate on the acts of the arresting citizen in the light of three normative principles, known in the jurisprudence as the principles of proportionality, absolute necessity and immediacy. These principles constitute the topics that my vignettes approach, the legal and normative problems that each vignette underpins.

The first topic addressed is the principle of proportionality. The principle establishes that the harm caused in an arrest cannot greatly exceed the harm threatened or produced by the aggression. However, how much harm is proportionate and unpunishable? The vignette of the handbag snatching deals with this question concretely in a case in which a woman ran over and killed a man while trying to recover her handbag from him. The question about proportion is made concrete in a situation in which the requirements

of the woman's duty to exercise greater caution overruled the woman's right to act, because she was a licensed driver.

The second vignette addresses the topic of necessity. The principle of necessity establishes that the actor should produce only absolutely necessary harm, using the least harmful means available. However, which are the least harmful means acceptable in a concrete case? This question is approached through the vignette of the robbery at the jeweller's, in which its owner shot at a suspect who had his gun pointed at the floor and his back to the jeweller.

Two different vignettes help studying the principle of the immediacy in the social realm. The principle determines that a citizen's arrest must begin and finish while the harm threatened by the aggression is imminent, present or had just been produced: this means that reactions can neither be retaliatory nor pre-emptive. The principle opens at least two possible questions: first, when does effecting an arrest stop and a fresh aggression begin? Second, where is the dividing line between someone using force to stop an aggressor, and starting a fight with a pre-emptive strike?

The vignette of the robbery at the supermarket deals with the first topic, which I term that of retaliatory reactions. There, a man hit a suspect in the face while the latter lay on the floor with his hands tied.

The vignette of the fight in the bus addresses the second question, the topic of pre-emptive attacks. This vignette depicts a situation in which a man punched another man in the face as the other approached him in a bus, after having been threatened by the same man a little while before.

Using these four vignettes I was able to present the respondents with concrete situations and reactions, employing cases in which the limits of the state law for citizen law enforcement had already been established. With their aid, I could now gain access to the ideas of legality living within the people. But whom should I ask? How could I find research subjects who could discuss through narrative the various ideas of legality present in society? This question guided the composition of my sample, which I constructed according to the following theoretical and practical considerations.

Sampling and selection

To construct my sample, I needed a method to enhance my chances of accessing the norms and values of the people. Respondents would need to be stimulated to speculate on possible reactions and to judge the reactions of other people, while enabling me to elicit their reasons and feelings. All this should happen in an interaction that I control. In practice, however, following respondents is more difficult for a Spanish speaker than for Dutch native speakers, therefore, to maintain sufficient control over the flow of answers and arguments, individual interviews rather than other forms of

verbal interactions (such as focus groups) appeared the most suitable method.

Interviews are verbal interactions planned with scientific goals, to motivate respondents to provide information, either through questions or other forms of stimulus (Lamnek, 2005).

Which characteristics make interviews a suitable method for my research?

First, interviews permit 'close scrutiny' (Gubrium and Holstein, 1997), the researcher can make respondents re-enact subjective perceptions and feelings, which permits the researcher to gain insight into the details of people's evaluations and reasoning. Second, interviews enable the researcher to document 'variety' in subjective ideas: the interview serves to reveal variations in argumentation (Merton and Kendall, 1946). The researcher can signal the path and contradictions within a single interview, and underline differences by comparing different fragments or arguments from different respondents. Third, interviews allow 'specificity', in the sense that topics and questions can be organized into specific forms during the interview, ensuring that the target topics and questions are handled (Hoft, 2000).

These characteristics made it easier for me to stimulate respondents to give narrative accounts, to talk about their impressions, opinions and reasons, looking at concrete situations, and to reveal the particularities of their arguments.

I used a method called 'theoretical sampling' to gather my data, because it helps construct the sample in the absence of an empirical theory that can be used to answer the research questions (Silverman, 2000). Black's self-help theory does not explain empirically which forms of legal consciousness there are within 'the gap' or how it opens, proposing merely that support for self-help is greater where people lack access to legal protection. To answer my research question, therefore, I needed to depart from Black's theory to further develop my own theoretical propositions and analytical concepts (Mason, 1996). Black's concept of access to legal protection was a guide to construct my sample, because if access to legal protection makes a difference to the support for self-help, it must also make a difference to the arguments people use to do so.

However, Black does not define what access to legal protection means: who has more or less of it? To gain greater precision on this point, I used an official Dutch report on conflict resolution (Van Velthoven and Ter Voert, 2004). In the report legal protection is understood to be assistance from a legal expert or an official, trained in law to address grievances. The report explains that access to legal protection is not distributed equally in society, and that six factors influence it: income, cultural background, educational level, social capital, age and gender.

I did not look for representativeness across the population, because my research questions are qualitative, not quantitative. I wanted to understand the normative ideas (arguments) underpinning approval of and willingness to effect unlawful citizen's arrest, and to contrast them with the normative ideas judges apply. To do this, I had to maximize the diversity of the subjective perceptions and arguments. If access to legal protection makes a difference, my sample had to be a heterogeneous compound of respondents with different levels of access to legal protection.

From the Dutch research I knew that people with the lowest income in society have the greatest difficulties in obtaining legal protection (RMO, 2004). I formed three categories of respondents according to their income to improve variation: 1. a high-income group of respondents earning more than €60,000 a year; 2. a middle-income group earning between €29,500 and €60,000; and 3. a low-income group earning less than €29,500 a year. I used 'gross average income' (*Bruto Modaal Inkomen*)[12] as a parameter to construct these categories.

Cultural background is constructed from two linked respondent characteristics: language skills and ethnic origin, the latter captured here by 'origin of parents'. Research in the Netherlands shows that people with a 'non-Dutch' background have major disadvantages in accessing legal protection (Barendrecht and Kamminga, 2004). People with limited Dutch have fewer chances of achieving direct agreements with their counterparts, and are thus forced to rely on informal and professional help in grievances. The more they need legal protection, the more they have to spend on it. On the other hand, ethnic minorities tend to regard the law with distrust: first, because they are more frequently checked by legal officials than 'white Dutch' people; and second, because legal officials normally disregard important considerations put forward by members of cultural minorities (Van Rossum, 2002). To add cultural variation to my sample, I constructed three groups: 1. native Dutch speakers with European or North American parents; 2. people for whom Dutch is a second language and who have one non-European or North American parent; and 3. respondents for whom Dutch is a second or third language and who have no European or North American parents.

Educational level influences people's access to law because poorly educated people are in a vulnerable position when they need legal information: they are forced to rely on professional help, which is expensive (RMO, 2004). To maximize variation, I formed three categories of respondents: 1. those who

[12] Gross average income sets the threshold at which an employer pays the maximum health insurance premium within the new healthcare system. The Ministry of Social and Labour Affairs uses this parameter to classify employees into income levels.

did not finished secondary school (understood in the Netherlands as MBO[13] and HAVO[14]); 2. those who finished university, or finished a higher vocational education school (HBO); and 3. an in-between group formed of those who only finished secondary school in one of its Dutch varieties: MBO, HAVO and VWO.[15]

Social capital influences access to legal protection because a network of relationships makes resources available that would otherwise not be. Through relationships, a person can obtain cooperation (Coleman, 1988:97-98) and valuable information (Putnam, 1995). The question is, nevertheless, what kind of networks of relationships make a difference to accessing legal protection? Because the importance of social capital is defined by the function it is called on to perform, social capital can be bonding or bridging. Bonding social capital reinforces identities within a group, acting in an 'inward looking' direction, isolating its members from other social realms. Bridging social capital brings people across diverse social realms together, acting in an 'outward looking' direction (Putnam, 2000:18-23). Bridging social capital can help individuals with low access to legal protection extend it, and bonding social capital can reinforce individuals' lack of legal resources. To achieve variation, again I constructed three groups of respondents: 1. people with friendship or kinship to legal agents or membership of 'bridging' groups (such as trades unions, civil rights organizations and the like); 2. people engaging in 'bonding' groups (such as football supporters, gangs and the like); and 3. people belonging to no network at all.

Gender makes a difference to the level of access to legal protection because women tend to see police and the law as more extraneous to them than men do (RMO, 2004). Accordingly, my sample includes both men and women.

Age also influences access to legal protection because young people and the elderly appear to have greater difficulties obtaining legal protection than middle-aged people (RMO, 2004). My sample therefore comprises three age groups: 1. those aged between 15 and 20; 2. those aged between 21 and 64; and 3. those older than 65.

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13 The MBO (*Middelbaar Beroepsonderwijs*) literally, 'middle-level vocational education') is oriented towards vocational training. An MBO lasts one to four years, after which pupils can enrol in HBO (*Hoger Beroepsonderwijs*) or enter the job market.

14 The HAVO (H*oger Algemeen Voortgezet Onderwijs* literally, 'higher general continued education') has five grades and is attended from age twelve to seventeen. A HAVO diploma provides access to polytechnic (HBO) or tertiary education.

15 The VWO (V*oorbereidend Wetenschappelijk Onderwijs* literally, 'preparatory scientific education') has six grades and is attended from age twelve to eighteen. A VWO diploma provides access to a university, although universities can set their own admittance criteria (e.g. based on profile or on certain subjects).

The final construction of the sample is as follows:

Table 1: Categories of respondents

Attribute	Category
Gender	Men
	Women
Age	15-20
	21-64
	Older than 65
Income (in €, yearly gross income)	< 29,500
	29,500-60.000
	>60,000
Educational level	Lower than MBO or HAVO
	Finished MBO, HAVO and VWO
	Finished HBO or University degree
Cultural back-ground (language skills + parent's origin)	Dutch as 1st language with European or North American parents
	Dutch as 1st language with non-European or North American parents
	Dutch as 2nd language with European or North American parent
	Dutch as 2 nd language with neither European nor North American parents
Social capital	Friendship or kinship with legal agents or membership in 'bridging associations'
	Engagement in 'bonding' networks
	People not belonging to any network

The strategy used to find respondents

To maximize heterogeneity, I recruited respondents in cities with markedly different sizes. I chose Amsterdam and Groningen: Amsterdam as the nation's economic capital and with around 770,000 inhabitants, the biggest city in the Netherlands; and Groningen, a provincial capital with around 190,000 inhabitants.

Considering that social capital was the most difficult of the listed features to find randomly, my strategy was to look for respondents within bridging and bonding networks.

The first thing I did was to find a bridging network in my surroundings: accordingly, I interviewed a law lecturer at the University of Groningen, a respondent belonging to the group of highly educated, white, Dutch, middle income, males. After that, I looked for someone who could contrast in characteristics and perspective to the law teacher. I contacted two different organizations in Groningen: the Jasmijn Vrouwencentrum (a Women's Centre), which provides legal and social support for immigrant women, and JOP (Jongerencentrum Oosterpark, in English: Youth Centre Oosterpark) – a project for young people in trouble with the law, in a working class neighbourhood. Thanks to the first contact, I interviewed a Moroccan woman from the mid-age category, with low income and education, and two young Dutch teenagers, a man and a woman, both of low income and unfinished education.

In Amsterdam I followed a similar strategy. I contacted the Stedelijke Raad van de Marokkaanse Gemeenschap (City Council of the Moroccan Community) in Amsterdam, who permitted me to interview a couple of their members: both non-Dutch, both with mid-income and education, of different age groups and genders.

Because I contacted state officials at various points in the process of my research, I asked them to recommend colleagues or friends with other characteristics, such as being mid-aged, mid-income and with high or mid-level education. I thus gained access to a couple more respondents.

Through one of my colleagues who was conducting research on street-gangs in Amsterdam, I was able to access young respondents of non-Dutch cultural background, low education and income.

I contacted a swimming team through whom I could make contact with a Dutch woman of high income and high educational level. Finally, through a networking association of highly educated foreign people (mostly members of the university staff), I made contact with a segment of high-income foreigners.

One category of respondents was especially difficult to recruit: Dutch, highly educated and high income persons aged over 65. I talked to church group

leaders and employees at homes for the elderly, but I found no one willing to be interviewed. Someone told me, however, that the category I was looking for actually lived in places called 'flats', usually located in the outskirts of the city. I found one such area near Groningen where the administrator allowed me to circulate a letter to the inhabitants, requesting their collaboration and inviting them to inform the administrator if they were willing to take part in an interview. This gave me the chance to interview a man and a woman, one of them highly educated and the other of medium education, both Dutch and of high income.

That was the strategy I followed to recruit respondents. As we saw, the strategy was directed by the desire to obtain diversity in respondents, because this was expected to lead to diversity in arguments. However, how did I assure the quality of my data collection?

The quality of the data collected through interviews

How could I trust the data I gathered? How could I be sure that respondents would be telling me 'the truth' about what they thought? This question touches a sensitive point about the reliability and validity of data. Reliability is the extent to which questioning yields the same answers whenever and wherever it is carried out. Validity is the extent to which inquiry yields the 'correct' or 'right' answers. With respect to reliability, it is impossible to say what respondents would answer three years after the interviews, or if they had been sitting with other people around and not in private, as was the case during our interviews. People are influenced in their opinions and values by their experiences and the ways things are addressed in society, which means that they also change perspectives. However, as Holstein and Gubrium (1997) state, the interview is a 'meaning making occasion', people interpret and evaluate while they are being questioned. This is why the way interviews are conducted is so important, because during interviews 'meaning is constructed'. In this moment, techniques for 'creative interviewing' gain importance: creative interviewing means moving from the exchange of mere words and sentences to establishing a climate of disclosure, where the interviewer is a narrative activator.

For me this meant making three kinds of effort: first, to establish a 'natural conversation'; second, to enhance my communicative skills; and third, to guide the shape of the interview.

First, I tried to reproduce as best as I could the conditions of a natural conversation, to be able to get into the detail of my interlocutors' views. For that, I avoided either making notes or following a questionnaire. I used a digital recording machine with a small and subtle microphone. I could leave the microphone on the table, the machine under it, and forget about the recording until we had finished the conversation. To ensure that all of my questions were covered without resorting to checking them from a questionnaire, I provided each respondent with a few sheets of paper which individually described the vignettes, to stimulate the discussion, and they

had extra paper to take notes if they wished. I had my own sheets of paper, which, unknown to my interviewees, rather than having the vignettes, were my own interview guide, consisting of a list of topics that I could check from time to time.

Second, the fact that I was not Dutch but a Spanish speaking Latin American woman restricted my communicative skills. Fontana and Frey (2000) note that not mastering the local language and culture could become a problem when interviewing: you can overlook the additional meanings of the things said, and omit interesting topics; you can also ask embarrassing or disturbing questions. In my case, language was a limitation, especially initially. My questions were often not sharp enough, or I could not properly understand the idiomatic expressions (very common in Dutch) that respondents used. However, I had two advantages: first, a student-assistant was appointed to accompany me at the interviews. She was an advanced and outstanding student of psychology who had just finished courses in criminology. She was experienced in qualitative research and thus assisted me in wording and rehearsing my questions, and she rapidly understood the goal of my interviews. Initially, she shored up my questions with some of her own during interviews, and drew my attention to expressions when we discussed them during our initial analysis of the interviews. Progressively, I started to learn these jargon phrases, and I developed a sense for when I was missing something. Then, the fact that I was a foreigner became an advantage, because I could paraphrase and formulate questions to uncover an underlying meaning where respondents were using idiom to hide prejudices or to give socially expected answers.

A very important aspect that could have frustrated my interviews was their shape (in the German sense of *Gestaltung*). I mean by that the location, the style of conversation and length (Hoft, 2000). Since I wanted to enter a private space of evaluations and perceptions, I decided to conduct my interviews in private spaces chosen by respondents. Usually, this meant interviewing them at home, and in some cases in a quiet room at a club or community centre. The conversational style was also important. Since respondents have different characters and expectations with respect to a 'researcher', I had to retune my style of questioning for almost every respondent. One of the styles I adopted consisted of trying to be quite passive and receptive, only making strategic, indirect, questions when respondents – who seemed bothered by direct questions – were evaluating and talking about perceptions on their own. Adopting another style, I was more active, paraphrasing and re-asking for the meaning of words and questioning to fill blanks, when respondents seemed to be taking many ideas for granted. Finally, in other cases, I had to show extra empathy, curiosity or vitality for respondents who were reserved, shy or tired. In any case, every interview was a new experience, in which I, as the interviewer, and the respondent went through different stages of distance, shyness, gains in confidence, contradiction and sympathy. To finish, I also paid attention to

the length of the interview. This meant trying to keep it short, not to lose the respondents' concentration. However, since I had to approach four different legal problems, and to go into them in depth, I knew the interviews would require time. Choosing faceted vignettes as research instruments was also a solution for this problem. Vignettes, as we will now see, stimulate people to talk at intervals, they awaken curiosity, and touch the moral thinker in respondents.

Interviewing

Interviews were preceded by a 'warming up' conversation, in which my student-assistant and I introduced ourselves, and I explained briefly in general terms that the interview was part of a PhD project dealing with public safety. The interviews were normally recorded after this introduction, from the moment respondents agreed to be recorded, and further recorded until the moment we finished completely and had to leave.

Sometimes, I received comments about safety problems in the neighbourhood during the introduction. I then asked some questions about previous experiences or indirect knowledge about victimization. After that, I explained that I would use vignettes, and we began with the interview.

The interview was divided into two parts. The first, which I will term 'the actual interview', served to investigate respondents' perspectives and normative ideas using vignettes and open-ended questions. The second served to collect the information necessary to establish the category to which respondents belonged, using a form.

During 'the actual interview' we dealt with the vignettes. Respondents received a small pile of paper on which they could make drawings or notes as they pleased, and on top, were the individual descriptions of the vignettes, as discussed above. Respondents read the steps themselves and began by answering a starting question that I wrote at the end of the step. From then on, I asked open-ended questions to elicit narratives containing speculations, explanations of their perceptions, details of the distinctions they drew, motives for a given preference, and grounds for evaluation. In my interventions, I normally asked for alternative ways of expressing a given opinion or argument, and I often paraphrased, to check if had I understood correctly, or to obtain deeper reflection on a topic. I had my own interview-guide, which consisted of a list of topics, and some ready-made phrases to help me initiate questions while avoiding 'why' questions.

After finishing the four vignettes, I asked respondents to complete a form which requested information to establish the category to which the respondents belonged.

The interviews lasted between forty minutes and one and a half hours.

After each interview, I took notes about my impressions and the things that caught my attention during the interview. I also had a chat with my student-assistant, during which we performed a quick analysis and discussed possible categories and relationships in the data. On the same day or the day after, I listened to my recordings and selected the parts for transcription.

In total, I conducted thirty-two interviews. This was not enough to cover all possible combinations of attributes, which would have required 486 interviews, something that could not have been achieved in the time I had available for the research. However, a complete collection of each permutation was not my goal, as what I wished to achieve was variation in the arguments elicited – along the lines of the theoretical questions and propositions (Hollway and Jefferson, 2000) – and obtaining 'rich descriptions' (Denzin and Linkoln, 1998) of the various normative ideas (subversive and hegemonic) that support illegal forms of citizen's arrest. In fact, I stopped conducting new interviews once I had achieved a 'saturation' of concepts.

Saturation of concepts is achieved when the interviews no longer provide new arguments (or categories), and when those arguments do not present new dimensions. The dynamic consisted of interviewing respondents of markedly opposing attributes, and in analysing them correctly, until new points stopped arising, at which point I knew that I had conducted enough interviews.

How did I analyse my data? How did I know that the arguments offered something special and how would this be made visible? These questions determined my method of analysis and presentation of results.

The analysis and presentation of results

The method for analysis and presentation of results had to facilitate descriptive and interpretative work. Descriptive work should map the gap, if it exists, between state law and the living law. Interpretative work should make the legal consciousness of people understandable, and contrast it with the legal rationale that judges apply. Therefore, this meant combining legal methods with socio-legal methods to analyse the empirical data, and later find a useful method to present results.

In practice, this work was done in various steps: first the analysis and then the presentation of results, though the work was done in a dialogue between the two.

Analysing the data

The analysis was done by applying the method known as 'grounded theory' (Glaser and Strauss, 1965; Corbin and Strauss, 1998), combined with exegetic and systematic methods of legal analysis.

To begin with, I used some 'sensitizing concepts' (Corbin and Strauss, 1998) relevant in the theory of self-help and my legal research. These concepts were useful for examining my data, putting concrete questions that could initiate interpretative work. At the very beginning I asked, for instance: does this expression of approval go beyond the law or remain within the law? Does it approve of acts that judges sanctioned or would consider illegal? Alternatively, in the case of expressions of willingness, I asked: would a judge approve or disapprove of the act this respondent prefers? To distinguish this, I applied legal methods and knowledge. The result was that I separated expressions of approval and willingness to accept or commit acts going beyond the law, from those approving and expressing willingness to act within the law. Because my goal was to further explain approval of and willingness to tolerate or commit unlawful acts, I worked with fragments that approved of and expressed willingness to go 'beyond the law'.

My classification of fragments kept the data grouped around each vignette, because each of them depicted a specific legal problem. For each vignette I thus had two folders: one with expressions of approval and one with expressions of willingness. Each of these two folders contained two further folders: one with narratives (expressing willingness to act or approval) within the law and beyond the law. Then I began coding the data.

Coding is the process of breaking data into pieces, developing concepts from it and integrating those concepts into an explanatory scheme (Corbin and Strauss, 1998). The procedure began with a 'microanalysis' of the data, in which I took expressions line by line, described them, looked for their meaning, underlined relevant ideas or concepts and compared them with other pieces of data.

As a first step, I looked for answers to my first socio-legal research question: do people approve of and express willingness to commit acts that are beyond the law? And are they aware of accepting illegal acts? I looked for expressions of approval and willingness to act beyond the law, and discovered for instance that approval is expressed in different ways. I read for instance:

'*I consider it right*'

This expression approves of a reaction from the point of view of the same narrator. However, others take another standpoint, saying for example:

'*I wouldn't convict him*'

Approval here is expressed from the point of view of a judge. However, I found other forms of approval too:

'*A judge would find it wrong. [but] I think the guys should have never been convicted*'

Here, approval again is uttered from the point of view of the same narrator, but rejecting a legal decision condemning the act. The respondent, as a citizen, is approving and in addition resisting a conviction. It thus becomes apparent that people adopt different approaches to expressing an opinion, and that respondents, though aware of the fact that a judge could disapprove, could themselves approve of acts.

Operationalizing the idea of the 'confusion' of De Roos (2000), I was finding in my analysis that approval and willingness to act beyond the law exist with or without awareness of the legal limits. I then made new folders for each vignette, into which I divided the approvals and expressions of willingness while aware of the illegality of the acts accepted from those made while unaware.

To answer my second socio-legal question, I began coding the arguments respondents offered to approve or express willingness. I departed from new sensitizing concepts and new questions. I knew people use different 'neutralization strategies' (Sykes and Matza, 1957) to express support for actions, and that they are similar to the 'justifications' found in state law. Using the idea of 'justifications' as a sensitizing idea, I began to look for the reasons or arguments people offer to support approval and willingness. I cut the interviews down, now selecting only those expressions that displayed the function of supportive arguments. I grouped them as grounds when they supported approval, and as motives for supporting a given willingness to act, joining them always in different folders for each vignette. Again, the microanalysis began by describing arguments, considering how the respondents name acts or events, and observing how those names take part in the argument to support a given preference.

During my analysis I asked myself how each argument relates to the legal principles of proportionality, immediacy, etc. Is it oriented or inspired by them, or does it use a fully alien idea, incommensurable to legal principles? With this question I was operationalizing my concepts of subversive and hegemonic legal consciousness. Applying exegetic and systematic legal analysis to the respondents' arguments, I could understand how far grounds and motives are hegemonic or subversive.

According to the specificities in each type of argument, I moved to constructing groups or types of argument, which I collected separately for each vignette into either hegemonic or subversive ones. A whole scheme became apparent, and then I had to decide how to present my results and organize my data into a text.

Presenting the results

In common speech, people do not normally offer clear statements of approval and even less often statements of principles or norms, but they do organize ideas and give meaning to events through narratives (Hollway and Jefferson, 2000). A narrative is a sequence of statements connected by a temporal and moral order (Ewick and Silbey, 1995).

Narratives can be a method for presenting results, enabling the presentation of peoples' own word, and the order of their own associations and ethical standpoints, followed by their interpretations of them. I adopted this as my method for presenting results, because it helps me reveal 'layers in meaning' (Andrews et al., 2010). These are different argumentative steps, a strategy people adopt to support a given appraisal. For example, when someone says:

> '*It was an accident. She <u>just</u> wanted to chase after them. She had no control over the car*'

Approval here is grounded in the definition of events as an 'accident'. An accident is an unfortunate and unexpected occurrence, in which harm occurs. By describing the action in question as an accident, the respondent regrets the harm, but excuses the producer of that harm (in this case, the driver). To such a definition, the narrative adds the 'actual' intention of the driver as being '*<u>just</u>*' to '*chase after them*', not to run the person over. The woman had '*no control*' over the car: therefore, she cannot be blamed for the accident. The definition of the events, added to the assumed intentions of the perpetrator, are the different layers of this argument.

Presenting narratives also allows me to show variation: how subjective standards vary among people. Different people use different arguments to ground approval, they establish other relationships, for instance:

> '*It's panic… you act on your instincts*'

This narrative brings panic and instincts into the argument, as conditions disturbing the capacity of the woman in question to reflect. She is seen as incapable of controlling herself and thus, cannot be blamed for the events that transpire. Comparing this and the previous narrative allows me to show how different types of arguments, as different ideas or principles, support approval. In the first narrative the woman cannot be blamed because she did not intend to kill, but merely wanted to recover her bag. In the second narrative, the woman cannot be blamed because she was incapable of acting reasonably: her instincts and panic governed her.

Finally, narratives also permit me to show the connection between subjective ideas and principles to the general discourses available in society. Ewick and Silbey (1995) argue that all narratives invoke 'collective narratives', they rest on common-sense understandings or discourses

circulating in society, but not all narratives partake of the same discourses. I will show in my presentation how some narratives verbalize discourses that contribute to the reproduction of state law principles (hegemonic narratives) and some defy them (subversive narratives).

Narrative uses hegemonic grounds, for instance, when stating:

> *It was panic… you act on your instincts'*

The narrative argues that a person should not be blamed, as the act was a direct consequence of the strong emotions produced by the aggression. The narrative uses '*panic*' and '*instincts*' as excuses for a disproportionate act. By doing so, it does not defy the principle of proportionality, but argues that the woman ought to have acted proportionally but could not because her emotions overwhelmed her.

I will also show how narratives can defy legal principles, such as when they state:

> '*Bad luck, he shouldn't have been stealing*'

In other words, this narrative states that the former aggressor (a young man on a scooter) should bear the consequences of his acts, whatever they may be, because he tried to steal. The narrative does not regret the death of the man (a disproportionate act), but argues as a principle that 'he who plays with fire cannot complain of getting burned'. It states that victims can react without restraint against aggressors, as the latter are responsible for their own fate.

I will structure my presentation to demonstrate through narratives how people approve of and express willingness to accept illegal acts, whether aware or not of the illegality of those acts, to answer my first socio-legal question. I will also show through narratives why people support illegal acts, revealing the arguments they employ and how far they are hegemonic or subversive to legal principles. That said, I will explain how the gap opens and provide ideas about how to bridge the gap.

A question remains: how could I explain the gap or provide ideas about how to bridge it through analysing the narratives of only thirty-two respondents? How could I say that much, with so little?

I will do it by interpreting narratives. 'Interpretative practice is concerned with understanding how the social construction process of giving meaning is shaped across various domains, on the crossroads of institutions and social interactions' (Gubrium and Holstein, 2000:496). Interpretative analysis consists of finding the 'common-sense ideas' contained in the motives people give to support their ideas. Long ago, Weber said the 'motives' people offer are not purely subjective expressions of their internal

worlds, but are socially constructed. A motive must be 'reasonable' to be perceived as such, and this is true, as long as it follows the dictates of common sense. Wright Mills (1940) remarked that motives are persuasive arguments people offer when attempting to 'promote' a certain action, whereby the actor appeals to arguments shared in society. Though motives might be accepted by some and rejected by others, when people offer motives, they use forms of argumentation accessible in their social contexts, which are existing frames of reference shared by some persons or groups in society.

Some motives challenge dominant verbalizations, others do not. By asking people about their arguments, we learn about the discourses available in society. Different motives are forms of speech representing the different 'systems of meanings' or discourses (Schwandt, 2003) available in society, though people are hardly ever conscious of them.

In this chapter I have explained how I apply hermeneutic methodology to study state law, and qualitative methodology to study the living law. I showed that I have used exegetic and systematic methods in my legal study, both to extract the legal rationale judges apply when assessing cases, and to expose the legal limits in concrete cases of citizen law enforcement. I also showed how, in my socio-legal study, I apply theoretical sampling to collect my data and analyse it through the method known as grounded theory. Finally, I explained how I employed narratives to present my results.

In the next chapter I will establish the legal limits to citizen law enforcement, looking first at the norms and principles regulating it, to later draw the line between legal and illegal citizen's arrest in concrete cases.

IV. The norms constraining and enabling citizen's arrest

Introduction

The present chapter aims to measure the legal space for citizen's arrest by showing the rationale courts apply to distinguish between *eigenrichting* and citizen law enforcement. This is a necessary step in order to draw the line between illegal and legal acts in the following chapter. Having drawn this line, it will be possible to contrast the space the law offers with the space citizens claim for themselves.

However, citizen's arrest, as a legal category, is only one of many others applicable when citizens respond to crimes. The legal space for citizen's arrest is ultimately defined by the space within which citizens can use their own forces to effect law enforcement.

Therefore, I will study a series of legal principles and categories to define the legal space for citizen's arrest, seeking answers to the following two questions:

1. Which are the legal norms constraining citizen law enforcement?
2. Which are the legal norms enabling citizen law enforcement?

To answer my first question, we will study the norms and principles that seek to prohibit *eigenrichting.* The law has no concrete provisions on *eigenrichting,* but introduces the principle that the rights of citizens can only be constrained by laws and the decisions of legal authorities (the legality principle of Arts. 16 GW, 1 Sr, 1 Sv, and Art. 5 ECHR). Different norms criminalize harm to legally protected interests and endow certain public servants with the authority to use force for the enforcement of law. Along that path, citizens' rights and liberties receive protection. However, this protection also recognizes exceptions. Those exceptions enable citizens to use force and cause harm under special circumstances, such as in self-defence, to enforce the law. In self-defence, citizens enforce rights and ultimately, the law.

To answer my second question, I will study these exceptions, the norms enabling citizens to exercise and defend their rights and liberties. Judges apply these norms when they are called upon to decide if a given harmful act can and should be punished. To do so, judges follow strict procedures (Art. 350 Sv), deciding whether certain proven acts can be brought under one or more categorical articles of the Criminal Code. To understand how the examination of exceptions proceeds before a judge when a citizen causes harm when trying to enforce the law, we will consider the following example.

Imagine that two men are walking in a park when they see another man grab a handbag from a woman and run away. They chase after him but lose sight of him. Half an hour later, they find a man dressed exactly like the suspect in the park. They now run after him, and after bringing him to the ground, they manage to catch him and force him into a car. However, on the way to the police station the man tries to escape, initiating a fight with his captors. The two men knock the man down and bring him to the police station, but the arrested man reports he was unfairly deprived of his freedom, and battered by the two men. The public prosecutor indicts the two arresting men on charges of unlawful deprivation of freedom (Art. 282 Sr) and actual bodily harm (Art. 300 Sr). The men argue in their defence that they tried to arrest the man and defend the woman and her property: that in running after the man, knocking him down and catching him, they aimed to apprehend the suspect to deliver him to the police and to recover the stolen handbag; that later on they used force in self-defence (Art. 41 Sr), because they were themselves attacked by the man in the car. When the court examines the indictment, the evidence and the statements of the defence, the court has to decide if the accused indeed committed the act he was

indicted of. This is the first step of the procedure provided by Art. 350 Sv. If the court finds this to be the case, the court analyses the qualification of the act: in our example, whether the injuries can be subsumed under Art. 282 Sr, unlawful deprivation of freedom and Art. 300 Sr, actual bodily harm (second step of Art. 350 Sv). Since the men stated that they grabbed the man to bring him into police custody, the court must decide if they acted within the limits of citizen's arrest (Art 53 Sv), considering whether the physical force used was proportionate to the resistance offered by the man and what was strictly necessary to effect arrest. If the two men did indeed act within the limits of citizen's arrest, the deprivation of the arrested man's freedom was not 'unlawful', because they had the legal authority to do so, meaning that they must be acquitted (*vrijspraak*).

However, the men also used force later, after the man was arrested, when the suspect began a fight in the car, and then inflicted bodily harm on him. If this act is proved and found to fall under a criminal norm, the court must then decide whether defences excluding criminal liability (first justifications and thereafter excuses) apply (third step of Art. 350 Sv).[16] This means assessing whether the two men from our example were acting within their rights or whether they can be excused from blame for inflicting harm on the suspect. Since the men stated that they hit the suspect to counter act his attack, they might have acted in self-defence. To determine whether they did indeed do so, the court must consider whether the injuries were a necessary and proportionate response to the man's attack. If the man, for instance, stopped his attack before the two men battered him, the court would find the injuries unjustified and exclude the application of the justification self-defence.

The court must then proceed to consider whether the two men can be excused for causing more harm than necessary. If the men did indeed act in a self-defence at first but then continued to hit the other person, overwhelmed by the emotions produced by his aggression, they could be excused for the 'improper use of self-defence'. However, if the court finds that the men cannot be excused, there only remains to decide whether sanctions should be imposed, and which ones (fourth step of Art. 350 Sv).

This example illustrates how different legal categories interact in legal considerations when citizens use physical force to enforce the law. To arrive at a verdict, the court follows the indictment by analysing whether the act accused is proven. If the act is proven, the court must establish, step-by-step, under which article of the criminal law it can be subsumed; whether

[16] A part of the criminal law doctrine locates the consideration of defences-justification in the second step of Art. 350 Sv, at which point a judge is considering the qualification of the act, and examines defences-excuse in the third step. For the sake of convenience, I follow Knigge and De Jong (2003) and Keulen and Knigge (2010), who examine the application of defences excluding criminal liability in the third step.

the act was justified (unlawfulness); and if the actor can be excused or not (culpability). In following these steps, the court decides whether the suspect must be punished.

In the same order that judges examine the qualification of acts to later deliberate on the application of defences (justification or excuses), I will individually examine first the authority of citizens to arrest, and then the defences that can exclude criminal liability – either by justifying harmful acts (*rechtvaardigingsgronden*) or excusing their actors (*schulduitsluitingsgronden).*

Citizen's arrest, known in Dutch as '*aanhouding op heterdaad*' (Art 53), is neither a defence justification (like self-defence) nor an excuse (like psychological *force majeure*). It is an authority (*bevoegdheid*)[17] granted by criminal procedure for citizens to stop and detain a suspect discovered *in flagrante delicto,* when this is necessary to transport him or her for investigation (Corstens, 2011: 371). It is an authority allowing citizens, again using the necessary and proportionate physical force, to do something that in principle policemen do: stop and detain a person for investigation. The law authorises citizens to do this when the suspect is discovered during the commission of a crime or immediately after it was committed. Without an explicit authority, these acts could mean and constitute the 'unlawful deprivation of freedom' (Art. 282 Sr), and be punishable.

Following the steps marked by Art. 350 Sv, I will begin my study of the defences that exclude criminal liability with the justification defences (*rechtvaardigingsgronden*). The first is the 'state of necessity', one of the two variants of the Dutch defence of *overmacht*[18] (Art. 40 Sr). This is a justification (*rechtvaardigingsgrond*) that excludes liability for damage caused to property or to an interest when protecting another of greater value. It applies to situations where different interests are in conflict and the actor takes a considered decision favouring one item of property or interest – the one with an objectively greater value – over others (De Hullu, 2012: 287-288). The study of this justification will enable us to understand, for instance, how a judge evaluates the case of someone who causes injury or damage to bring a suspect to a police station or to prevent his escape.

Later, I will study self-defence, provided as '*noodweer*' in Art. 41, 1 Sr. This defence (a *rechtvaardigingsgrond*) justifies a harmful act undertaken against

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17 The Dutch term *bevoegheid* is translated in English as competence, power, qualification, authority, or jurisdiction (Van Dale Nederlands-Engels Woordenboek). From all these terms, I chose for the term 'authority' for its direct reference to 'a claim of legitimacy... for the ability to influence somebody to do something that he/she would not have done' (Black's Law Dictionary).

18 The Dutch '*overmacht*', here translated as *force majeure*, embraces a number of exceptions, of which only the state of necessity (a defence-justification) and psychological *force majeure* (a defence-excuse) are studied here.

an unlawful aggression (De Hullu, 2012:309). We will learn here why only certain legally protected interests, such as physical integrity, material goods or decency, can be defended, and understand the conditions the former unlawful aggression must fulfil in order to justify an act in self-defence. The study of this legal category will enable us to understand, for instance, how a judge evaluates the reaction of someone who shoots at an armed person committing a robbery.

Within the chosen framework, in my study of each of the defences excluding criminal liability, I will discuss three legal categories that judges consider to decide whether defences are applicable. They are the principles of proportionality, necessity and immediacy.[19]

The principle of proportionality requires balancing the threat to legal interests against those interests harmed by the reaction. This 'balance' has different meanings in the various legal categories observed: for the state of necessity it means that the actor has to prove that he or she protected interests with greater value than the one harmed. In self- defence or citizen's arrest, however, some imbalances can be accepted, if the harm produced is not much greater than the defended interest (Knigge and De Jong, 2003:172). Our study will show how we solve the dilemma of deciding between completely different goods, as is the case when comparing life to material property.

The principle of necessity also requires that an actor must achieve the lesser of possible evils. If there are different alternatives to hand, a person must always choose the least harmful reaction. If lawful means are available, those must be chosen, and where different means with different harming potentials are available, we are expected to choose the one with the least potential for harm (Knigge and De Jong, 2003:172). The interpretation of this principle divided the jurisprudence on the question of whether the actor is obliged to escape (*vluchtplicht*) before reacting in self-defence (Machielse, 1986:655; De Hullu, 2012:311-315). Current jurisprudence agrees that the obligation to escape is not a requirement in Dutch criminal law *per se*.[20] However, a person's opportunity to escape from an aggression will make a difference when the judge comes to weigh the need for a given harmful reaction (De Hullu, 2012:315-316).

The principle of immediacy, as it will be understood in this work, embraces two different temporal requirements. The first seeks to exclude retaliatory acts: reactions must begin and end in the same period as that in which the

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[19] The jurisprudence does not explore a 'principle of immediacy', but because knowing the legal limits of citizen arrest is a condition required by all the legal categories studied, I will study it here as a principle that crosses all defences.

[20] This turned out to be especially clear after the decision of the HR known as the '*Juliëttbend*', HR December 21 2004, LJN AR3687, NS, 15.

danger or the aggression takes place, or immediately after it. The second requirement seeks to exclude pre-emptive strikes: reactions cannot begin if the aggression is not imminent or the danger acute (Knigge and De Jong, 2003; Cleiren 2000).

If a judge finds that a reaction did not obey these principles, the act will constitute a crime, unless the same actor cannot be blamed for acting the way he did. Here, the other '*schulduitsluitingsgronden*', or excuse-defences, which come into judicial consideration are 'psychological *force majeure*', 'the improper use of self-defence' and the 'absence of all fault'.[21]

'Psychological *force majeure*'[22] is an excuse (*schulduitsluitingsgrond*) excluding liability when a person had no choice but to cause harm when compelled by an irresistible psychological pressure (De Hullu, 2012:290). The study of the doctrine and case law surrounding this defence permits us to understand how a judge will approach a case where a person reacts to produce unnecessary injuries or damage to property, driven by the fear of becoming again (after repeated experiences) the victim of crime.

The improper use of self-defence, in Dutch *noodweerexces* (Art. 41, 2 Sr) is an excuse that could apply when in a self-defence situation, a person inflicts disproportionate or unnecessary harm (De Hullu, 2012). The improper use of self-defence excuses the actor for an excess, which is the immediate consequence of the strong emotions produced by an aggression. The study of this legal category will help us understand how judges evaluate, for instance, the case of someone who hits an aggressor who is already defenceless.

The absence of all fault, known in Dutch as *avas*, (an abbreviation of '*afwezigheid van alle schuld*') is an unwritten excuse introduced by case law. It can be argued when a person commits an unlawful act lacking a minimum level of fault. I will study only two of the four different forms of *avas*,[23] namely the mistake of fact (*feitelijke dwaling*) and maximum required caution (*maximaal te vergen zorg*), as generally only these two could apply in cases of citizens making forceful law enforcement.

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21 Other defences-excuse are excluded from this study as they are neither applicable to the case-study nor (and especially not) to the empirical social research.

22 I chose the translation '*force majeure*' for *overmacht*, rather than the English term 'duress', because the Dutch defence of *overmacht* embraces forms of threats the English defence of 'duress' does not. Duress applies 'when a person produces harm under the threat or fear of death or a serious harm', while the Dutch legal category is broader, speaking of reactions against 'forces' (Ashworth, 2006).

23 Only these two forms of *avas* apply to the case study and the empirical social research.

A mistake of facts excuses a person who harms in ignorance of the fact that his acts can produce such harm (De Hullu, 2012). The defence could be pleaded, for instance, to excuse someone who shoots at someone (in the attempt of catching a suspect), while believing he was threatening to shoot using a toy gun; but it could also excuse someone who shoots believing the other person's gun is real, despite being a toy gun. Maximum required caution (the second form of *avas*), excuses an actor who causes harm despite taking the maximum precautions required to prevent that harm from happening. This could apply, for instance, in a case where a person runs over a suspect (causing, for instance, grievous bodily harm), despite driving carefully, because the suspect lost control of his motorcycle.

To finish, I will study two corrective criteria developed by the jurisprudence. They apply both to excuses and justifications. They are the criteria of *culpa in causa* and the existence of a *Garantenstellung.*

Culpa in causa excludes justifications or excuses when a defendant has brought himself purposely to the need to react harmfully. *Garantenstellung* excludes justifications or excuses when an actor possessed significant opportunities to cause lesser harm because of his special skills. This means that a person who puts himself in a position where he has to cause harm is culpable, as is a person who, having the skills to cause lesser harm, did not use them.

Now that we have enumerated the legal categories that can interact in legal considerations when citizens act in person to enforce the law, I need to restate the kind of actions that are the subject of my study. The kind of actions studied here are those of the victims of crimes who use physical force to catch suspects or stop attacks. This means force is used to catch and deliver a suspect to the police, to stop a suspect from completing his act, or to frustrate his escape. Excluded are reactions started long after the aggression was over, to take revenge, to punish, to teach a lesson or to gain redress. These actions are forbidden, but exceed the limits of this study because this study focuses on spontaneous reactions.

I will also concentrate on reactions that occur in public places. By this I mean 'outdoor' public places, as well as 'indoor' places accessible to everyone, such as shops or buses. Reactions in private spaces are excluded.

Forceful reactions against unwanted behaviours which are not crimes are also excluded. As we will see, responses to on-going criminal acts will be studied. This excludes the pro-active acts of citizens against potential or planned criminal acts as much as reactions against crimes, which did not reach any further stage than an attempt.

Citizen's arrests do not necessarily imply the use of physical force. In this research however, I will focus on citizen's arrests where physical force is

used. The legal study hence draws the legal limits for citizen's arrest in the forceful enforcement of law.

This is done through two forms of study: a theoretical one and a case study. The first part, a rather theoretical one, reveals the legal rationale behind the limits to citizen law enforcement.[24] It includes the study of norms constraining the space for citizen law enforcement, and the norms enabling it. In the section about the norms constraining action, I study the legality principle and the allocation of the function of enforcing law among state organs. In the section on the norms enabling action, I study defences excluding criminal liability, along with the principles of proportionality, necessity and immediacy – which judges apply in concrete cases – and the extra legal requirements of *culpa in causa* and *Garantenstellung*.

The chapter ends with conclusions, which, benefitting from the theoretical study, show the rationale judges apply in deciding whether a person acted legally or committed (illegal) *eigenrichting*.

The norms constraining action

Today, it is commonly understood that the criminal law prevents citizens from taking the law into their own hands (De Roos, 2000; Van Wifferen, 2003). In criminal legal jurisprudence, life in community is possible because criminal laws contribute to establishing norms for coexistence and enforcing them (De Hullu, 2012). The state centralizes the use of physical force to investigate crimes and impose sanctions, and in doing so, bans *eigenrichting* (Enschedé, 2005). Citizens can thus solve their grievances by resorting to legal authorities, which are summoned to react against the perpetrators of crimes. 'If they could not, they would soon tend to take forbidden means into their own hands, bringing society into chaos' (Corstens, 2011:10). The prohibition of *eigenrichting* is known as the sociological foundation of the state's monopoly over forceful means.

The premise of the state monopoly over force is the result of a historical process beginning in the 16th century, when modern states slowly began to be constructed. In that process, states progressively concentrated in their hands the power to use force, while individuals had to renounce it (Tilly, 1990). This was done through consecutive norms, which recognized civil liberties for citizens and granted state organs the authority to constrain those liberties. Ultimately, states acquired the power to organize the enforcement of laws, to punish and to apply coercive measures, while citizens were banned from exercising these powers. On the way, *eigenrichting* was forbidden.

[24] For this theoretical legal study, I mainly follow De Hullu (2012) and turn to additional jurisprudence when they represent views contrary to his views.

Nevertheless, there is actually no explicit norm forbidding *eigenrichting* in the Dutch legal system (Rutten, 1961). The criminal division of the HR declared *eigenrichting* illegal with certain consistency[25] in the 19th century (Van Leer, 1909:26), but the civil division did not follow suit. Moreover, during the Civil Code project debate in 1820, the legislator included an explicit prohibition in the text, which was later removed on the ground that an explicit provision was not necessary (Rutten, 1961). Between 1879 and 1881, when Parliament discussed the Criminal Code project, two conflicting visions met in the debates. One proposed to explicitly forbid *eigenrichting*; the other considered it was unnecessary. The first argued that if a system was established for the realization of civil liberties, the law should forbid the parties to a dispute to apply coercive measures; otherwise, this could lead to abuse and chaos (Van Leer, 1909:22). The second vision, however, following German jurisprudence, argued against any explicit prohibition. It maintained that the term *eigenrichting* had no legal relevance: an act can neither be illegal nor legal just because the actor intended to 'make justice' (Rutten, 1961:13). Though this second doctrine of justice did not gain much support among legislators in the Netherlands, Minister Modderman argued before Parliament in 1880 that the only responsibility of the legislator with respect to *eigenrichting* was to remain silent. The fact that an act is committed with the goal of enforcing a right, neither makes of the act a crime nor justifies it, he stated. The conclusion was that there were sufficient limits for such acts in the rest of the legislation (Smidt, 1891, II:572). By virtue of the legality principle, criminal laws provide for the protection of goods and rights when they criminalize conduct. Henceforth, any harm to legally protected interests not authorised by law (for instance bodily harm), was forbidden. The prohibition of *eigenrichting* was considered redundant because this prohibition was already contained in general prohibitions against committing crimes (Smidt, 1891, II:572).

The rhythm of the legality principle

In the Dutch legal system, individual rights and liberties are protected from state's powers and other individuals as an imperative of the rule of law. Because civil liberties – such as the freedom of movement or physical integrity – are legally recognized, they are inviolable unless the law explicitly (legality principle) authorises it (Enschedé, 2005). When someone, for instance, makes use of physical force to catch a criminal suspect and causes injury, he or she is overstepping a limit because the physical integrity of the arrested person is harmed. By force of the legality principle, citizens or public officials commit a crime when they cross those limits, unless they do so in the exercise of an authority conferred on them by law.

The legality principle of Arts. 16 GW, 1 Sr, 1 Sv, and Art. 7 ECHR, could be regarded as a sort of 'rhythm' at whose beat rights and powers play in a composition. Laws are generally addressed to citizens and to legal officials,

[25] See for instance HR 10 May 1870, W 3222.

establishing rights. Laws clarify for individuals what they can expect from each other, and provide the criteria for assessing their actions. For judges, police and other legal officials, laws determine how they should fulfil their functions in enforcing laws (Enschedé, 2005). The criminal law thus comprehends two branches of legal norms, the substantive and the formal criminal law. The substantive criminal law protects rights and liberties by describing those acts which are forbidden and punishable, the conditions under which they are criminalized and the sanctions that can be imposed. The formal criminal law provides the way in which the substantive criminal law will be realized, structuring, on the one hand, the process of investigation, prosecution and trial; and providing, on the other, legal officers within that process with authority, and suspects with rights (Kelk, 2005). The legality principle thus marks out the space within which liberties and rights are protected, criminalizing acts which affect them (Knigge and De Jong, 2003), and providing the authority to restrain those same liberties in the enforcement of the law. The rule of law rests on this principle and on a complex system of distribution of various law enforcement powers, in which no one, neither citizens nor criminal investigators, has absolute power over the rights of others.

But what does 'law enforcement' mean?[26] Knigge and De Jong (2003:17) define the enforcement of law as an activity directed at maintaining control over conduct which violates norms. Hulsman (1965) defines law enforcement as the efforts performed by the law ('*recht*') in two directions: 1. to prevent the occurrence of unlawful acts ('*onrecht*'), known as pro-active law enforcement, and 2. after '*onrecht*' has occurred, the efforts of the law to investigate, establish sanctions, decide who and how someone will investigate, and decide the application of sanctions (known as reactive law enforcement).[27] Law enforcement often entails the restraint of rights. The application of a sanction, for instance, implies by nature the injuring of rights: punishment is ultimately state imposed suffering (Hulsman, 1997). This is why, according to the legality principle, a decision to punish must be the result of a 'due process'.

However, it is not only through punishments that rights and liberties can be affected in the enforcement of laws. Criminal investigations can impact on rights when coercion, such as arrests, is used (Knigge, 2001). As we will see in detail, coercion authorises some individuals to affect rights in a provisional way. In the Dutch rule-of-law system (*Rechtsstaat*), the public prosecution service and the police have the authority to employ coercion as part of their enforcing the criminal law function, and citizens are also allowed to arrest a suspect. Citizens are, however, the weakest link in this

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[26] Laws are enforced by different systems of legal enforcement, such as the criminal law, the civil law or the administrative law. Here I will study exclusively the enforcement of criminal laws.

[27] Only the reactive actions of citizens are of interest here.

chain, for the greater the impact on rights a particular form of coercion produces, the higher the official who will receive the authority to apply it (Groenhuijsen and Knigge, 2001). We will explore this in the pages which follow, where we will study the structure that laws provide for the intervention of the state and citizens in the reactive enforcement of law.

The function of enforcing the criminal law

In the Dutch legal system, certain state organs have as a matter of principle the function of enforcing the law. The state monopolizes the function of forcefully reacting to unlawful behaviour (Enschedé, 2005:5; Van Wifferen, 2003:620) and citizens are excluded from that function.[28] The law allocates this function to a chain of authorities and public officials, such as the public prosecution service (Art. 124 Wet RO) and the police (Art. 3 PW 2012). The police are tasked with investigating criminal offences (Art. 12 PW 2012, Arts. 141, 142 Sv) and using forceful means. The public prosecution service directs these police efforts and the Ministry of Justice instructs prosecutors in their role in directing police activities (Art. 127 Wet RO). The public prosecution service thus plays a central role: though the police conduct the actual investigative activities and use coercion, the prosecution service has power over both activities, deciding on the prosecution of cases.

Only public prosecutors can bring indictments before the Courts or decide to drop a case, because they own their procedures, they exercise the role of *dominus litis* (Corstens, 2011). Based on Art. 167, 2 Sv, the prosecution evaluates whether there is a general interest in prosecuting each case,[29] and has the authority to abandon cases if there are other ways to resolve them than by criminal prosecution. Prosecutors, however, do not exercise their power alone but follow instructions.[30] The board of the prosecution service (*College van Procureurs-Generaal*) ensures fairness and consistency in the decisions of prosecutors during criminal procedures (Corstens, 2011).

In relation to self-defence and the use of coercive means, the Board of Procurators General (*College van Procureurs-Generaal)* issued an instruction in December 2010 (2010A030) on the circumstances under which a person who acted in self-defence (or made an improper use of it) should not be

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28 Here the term 'function' is used in the sense of the Latin word '*officium*', referring to professionals charged with particular tasks for the enforcement of the law, and with the authorities to achieve their fulfillment.

29 Art. 167, 2 Sv prescribes that the cases must be prosecuted unless there are reasons to refrain. In the last few decades, however, the principle applied is that cases are only investigated when the unlawful behaviour in question cannot be controlled by other (non-criminalizing) means (Minkenhof, 2002:50).

30 The term 'policy-instructions' refers to a group of various sorts of orders and instructions circulated internally within the public prosecution service. They are known in Dutch as *aanwijzingen, richtlijnen voor strafvordering, instructies* and *handleidingen* (Corstens, 2011:34).

arrested. The instruction applies to cases resulting from incidents in private places (the domicile), semi-public places (such as a shop) and public places, for instance in street muggings. In such cases police officers have to investigate the circumstances of the case and identify the suspects, but must avoid in principle the application of coercive means which deprive the person who acted in defence of his or her freedom.[31]

Authorities granted in criminal procedures

Criminal procedure is a complex of interrelated activities, which aim to realize the substantive criminal law through the elucidation of presumed unlawful acts and by establishing eventual sanctions. The procedural criminal law structures the criminal procedure, establishing how the process should develop and who should carry out the roles within the process (Knigge, 2001). Criminal procedure can affect civil rights and liberties (e.g. by the imposition of sanctions or the use of coercion). By virtue of the legality principle, procedural norms endow certain persons with the authority to investigate, prosecute, judge and sanction. When a citizen is arrested for investigation, coercion is used. We are interested to determine here who is authorised to carry out this activity, and how far citizens can go in doing it.

According to Art. 141 Sv, certain public officials are accorded the function of investigating punishable acts. The public prosecutor orders the members of different police forces to fulfil the practical activities of the investigation. Article 142 Sv also invests other persons (*buitengewone opsporingsambtenaren)* with the authority to conduct investigations. The question remaining is whether individual citizens can also take part in investigations leading to the arrest of suspects.

Some commentators (such as Cleiren and Nijboer, 2011 aant.3 Art. 1 Sv) consider that the enumeration of 'investigators' contained in Art. 142 Sv is restrictive, meaning that mere citizens cannot perform investigatory activities. Others, such as Corstens (2011) and Reijntjes (1989), maintain that the enumeration is not restrictive. The first position argues that the enumeration is restrictive because investigations in criminal procedures can affect the rights and liberties of citizens. It is for this reason that it must be retained as a state function, because such authority should have been granted explicitly to individual citizens by law (Cleiren and Nijboer, 2011:

[31] A bill introduced by Teeven and Weekers (31407) in 2007-2008 partly inspires this instruction. The bill proposes changes to the definition of self-defence (introducing the concept of 'imminent danger'), inverts the burden of proof in cases of self-defence when the aggression took place in the victim's domicile (*huisvredebreuk*) or the shop (*lokaalvredebreuk*), and limits the application of coercive means by the police when dealing with individuals who defended themselves. The bill was not passed into law.

aant.3, Art. 1 Sv).[32] The second position argues that everyone has the authority to conduct investigations, implying that anyone can gather and store information, just as journalists do.

To Knigge (in Groenhuijsen and Knigge, 2001:251), the parties in that debate take different starting points. The first refer to investigations made in the context of criminal procedures, while the second refer to the activities of 'collecting information' about a punishable event outside criminal procedures (2001). For Knigge (2001), the allocation of functions (*taken*) prescribed by Arts. 141 and 142 Sv is restrictive because it is granted in the context of criminal procedures, where investigation could affect the rights of citizens. Coercion can be used during an investigation, but having the authority to investigate does not imply the authority to use coercion. By virtue of the legality principle, the more an intervention affects the civil rights and liberties of citizens, the greater the need for explicit legal authority (Groenhuijsen and Knigge, 2001). Arresting someone necessarily implies an intrusion into private rights and liberties, and for that reason the act requires explicit legal authority. The officials mentioned in Articles 141 and 142 Sv are granted a general authority to gather information, but also receive special authorities to arrest (Art. 53 Sv) or carry out a search of the person (Art. 56 Sv). The situation is similar for citizens, but their authority to effect arrests is granted under more restrictive conditions than for public officials, in fact only in cases of *flagrante delicto*. In that case, citizens have the authority to effect arrest independently of legal officials because there is a high degree of certainty about the authorship of a crime, but in doing so they can only use proportionate and necessary force. Beyond these limits, they are committing punishable acts.

The Norms Enabling

Generally speaking, all conduct fitting within the description of a criminal norm is criminal, and the actor is liable. Only under exceptional circumstances, such as when a person causes harm in his own defence, is the act not criminal. We saw above that substantive criminal norms (such as Arts. 302 Sr: Serious bodily harm; or Art. 300 Sr: Physical abuse) describe particular forms of conduct as punishable, but also describe circumstances that could justify or excuse the actor for harm to legal interests (such as 41,1 Sr: Self-defence).

For a crime to be punished, three general conditions must be fulfilled.[33] First, the conduct must be found. Second, the conduct must be unlawful (*wederrechtelijk*). Third, the actor must be liable for his conduct (*verwijtbaar*). As 'conduct', the criminal law understands a human act or an omission, performed with a minimum of intention and basic knowledge. For

[32] For more about this discussion see: Groenhuijsen and Knigge, 2001:251-279.

[33] I present here a synthetic introduction to the structure of crimes. For a more detailed study see Knigge and De Jong (2003) or De Hullu (2012).

conduct to be unlawful (second condition): first, the conduct must produce harm or put at risk legal interests or property, as understood in a criminal norm. Second, the conduct must be unjustified, with justification resting on whether it was performed to serve a superordinate interest. The third general condition is that the actor must be at fault for the act, meaning that he can be held liable or blamed for the act because he had the choice to conform to the law while acting, but he did not (Knigge and De Jong, 2003).

These three conditions for an act to be punishable are also conditions for punishment. They derive from the principle of *nulla poena sine praevia lege*, contained in the legality principle, which establishes that a person cannot be punished unless his or her conduct was described and forbidden by a criminal norm previous to the act (Enschedé, 2005).

A trial judge will assess whether these conditions are fulfilled when coming to hand down a verdict in a case. To assess them, the judge will follow the steps marked by Art. 350 Sv.[34] He will (first step) have to be sure about the facts indicted to the defendant by the public prosecutor. Once certain about the facts, the judge will consider (second step) how they should be qualified or subsumed in a concrete criminal norm. It is then presumed that the accused is punishable, but exceptions could still apply, thus this is the question the judge answers in the third step of Art 350 Sv. The judge must next decide whether defences excluding criminal liability apply, thus if the act is unlawful (*wederrechtelijk*) and the accused can be punished (*verwijtbaar*) for it (third step). Consequently, the judge will assess whether a sentence can and should be imposed, and which sentence should be imposed (fourth step).

If the judge finds the facts the prosecutor presented in the indictment proved, the judge assesses whether there is enough evidence to support the allegation that the suspect committed the act in question,[35] and whether the conduct fulfils all the legal requirements of a criminal norm. The conduct of the accused must correlate in detail with all of the elements prescribed by the norm, because if it does not, the person did not commit that specific crime, though perhaps another, and must be released of those charges. In some cases, the judge will already consider at this stage whether denials of proof or defences also apply. If the suspect is charged, for instance, with 'unlawful deprivation of freedom' (Art. 282 Sr), but he or she argues and proves having effected citizen's arrest, the suspect will be acquitted (*vrijspraak*). This is because when a person effects an arrest and does so within the limits established by the law, the person is not depriving another person 'unlawfully' of his freedom, but lawfully; the conduct does not match

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34 The '*hoofdvragen*' regulated by Art. 350 Sv are presented here in summary because the aim is to show how defences excluding criminal liability enter into the deliberations of judges deciding a case.

35 This is known as *1e materiële vraag* of Art. 350Sv.

all of the elements prescribed by the norm. However, if the conduct matches the legal description, the judge will qualify the act,[36] establishing the norm applicable to the case, and move to the next step. The judge will then consider whether the act is unlawful and the suspect liable for it. Whether pleaded by the accused or *ex officio*, the judge will consider if any defence-justifications (such as self-defence under Art. 41,1 Sr) or defence-excuses (such as the improper use of self-defence under Art. 41,2 Sr) are applicable. If defences apply, the criminal charges must be dismissed[37] (*ovar*). On the other hand, if the act is unlawful and the accused liable for his conduct, the judge will decide whether sanctions should be imposed and which ones.[38]

Let us consider an example to illustrate this process. A citizen (C) catches S, twists his arm behind his back and takes him into a locked room. By doing so, C is harming interests protected by the law: he is depriving S of his physical freedom (Art. 282 Sr). If in addition, S is injured, C may also be accused of committing an act described as 'battery' in the criminal law (Art. 300 Sr) or ultimately 'grievous bodily harm' (Art. 302 Sr). However, if C was actually arresting S, suspecting the latter had just committed a crime, and used during the arrest only the force required to permit it and deliver the suspect to the police, C was actually not acting 'unlawfully'. The point is that an act must be 'unlawful' to constitute a crime, and this is even clearer in the case of the 'unlawful deprivation of freedom'. A person catching a suspect of a crime red-handed to promptly deliver him to the police does not act 'unlawfully', because he received by law the authority to act independently from legal officials and effect an arrest (Art. 53,4 Sv), because the police would not have been able to reach the scene in time.

Imagine now that in our illustrating case, the other person resists arrest and tries to attack C with a knife, provoking C to use physical force to defend himself, harming S. If S reports the offence and the prosecutor brings charges against C for battery and grievous bodily harm, C could still be cleared of the charges if he proves that he only used 'absolutely necessary' force and produced 'strictly proportionate'[39] harm to defend himself (Art. 41,1 Sr).

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36 This is known as the *2e materiële vraag* of Art. 350Sv.

37 There is debate in the criminal law doctrine about whether defence-justifications are dealt with in the 2nd or 3rd material question. For practical reasons I have adopted here the condensed scheme put forward by Knigge and De Jong (2003), and located the consideration of justifications along with excuses in the *3e materiële vraag* of Art. 350 Sv.

38 This is known as the *4e materiële vraag* of Art. 350 Sv, which could have multiple answers. Arts. 9 and 9a Sr give judges a broad range of options to chose between different sorts of sanctions, or impose no sanction at all.

39 These are the terms used in Strasbourg case-law (For more detail see Ashworth, 2006:139).

Through the example we can see how a harmful conduct can be exempted from criminal liability because the conduct does not fully match the description of a criminalizing norm (the deprivation of freedom was not 'unlawful', but authorised) – 1st step of Art. 350 Sv – or because defences excluding criminal liability (such as self-defence) could be applicable – 3rd step of Art. 350 Sv. In the following pages we will see in detail how the requisites for the qualification of conduct (the term 'unlawful' contained in a criminal norm) or the defences excluding criminal liability (such as self-defence, *force majeure*, the improper use of self-defence or psychological *force majeure*) enable citizens to use their own force during arrests.

The term 'unlawful' in criminal norms

Dutch criminal law criminalizes acts through various wording: sometimes conduct is described as creating criminal liability, for instance when the law states: a person who 'inflicts serious bodily harm… is liable…' (Art. 302 Sr). Sometimes the law defines acts as crimes, for example when stating in Art. 300 Sr: 'Physical abuse is punishable…' (Knigge and De Jong, 2003). In other occasions, the norm includes additional elements in its formulation, for example by adding the term 'unlawful'. This is the case in Art. 282 Sr, which criminalizes the deprivation of freedom by stating: a person 'who unlawfully deprives someone of his freedom… is liable.' The same occurs in Art. 138 Sr, which criminalizes the unlawful entry into a private space (*huisvredebreuk*); or Art. 350 Sr, which criminalizes the destruction of or damage to material goods. They all include the term 'unlawful' in their formulation and this expression naturally performs a function.

In the jurisprudence, the term 'unlawful' prevents an act from being criminalized when an actor performs it in the exercise of superior rights (Hazewinkel-Suringa, 1994). The authors argue that in some cases, none of the exceptions or defences excluding criminal liability are sufficient to render actions as authorised by law. The term 'unlawful' in the norm ensures that such actions are indeed not criminalized.

To Jonkers (1984:49), the term 'unlawful' in criminal norms simply obliges judges to assess at an early stage whether defences excluding criminal liability apply. When harm has occurred, such as when one person strikes another, the judge assumes the defendant acted unlawfully. He will later evaluate whether any defences exclude the defendant's criminal liability, but the judge departs from the assumption that the act was unlawful. By including the element 'unlawful' into the law, the legislator forces the judge to check the unlawfulness of the act at the moment of checking whether the act falls within the legal description of a crime. If we think back to the steps prescribed by Art. 350 Sv, we will recall that as a third step, the judge assesses whether defences-justification, which exclude 'unlawfulness' (*wederrechtelijkheid*) apply, and whether defences-excuse apply. However, when the term 'unlawful' is present in the description of the crime in

question, this becomes an element of the proof assessed in the 1st step, along with the question of whether the facts are proven.

Unlawful means here '*in strijd met het recht*', thus in breach of the written and unwritten law. As an element in the qualification, 'unlawful' is therefore no different to the 'unlawful' in the 3rd material question. When judges find the unlawfulness of an act proven, it is not necessary to assess again whether the conduct was justified, because the conduct was already found to be unlawful. If, on the contrary, the judge finds that the person acted 'lawfully' because he or she had the authority to do so, the defendant is acquitted (*vrijspraak*).

The question then is, when do citizens have authority to deprive a person of his liberty and which are the limits for doing so? To answer this question, we will first study the legal authority given to citizens to effect arrests.

Citizen's arrest

According to procedural criminal law, every citizen is vested with the authority (*bevoegheid*) to restrict the freedom of a person when the latter is found to be committing an aparent crime. Citizen's arrest is one of many coercive means available in criminal procedures (Corstens, 2011). What is special about it is that a citizen rather than a public official is invested with the authority to exceed the legal limits prohibiting interference with the freedom and physical integrity of citizens, and to use such physical force as necessary to effect an arrest. If this authority were not conferred, the act would be a crime. The reason for the conferral is that the discovery in *flagrante delicto* allows great certainty about the authorship of the crime.

How does this authority apply? Imagine, for instance, that a citizen C sees S (a suspect) snatching a handbag from a woman and running in his direction. At the moment S passes him, C rises his arm, hitting S in the face, breaking his nose. C then ties S's hands and brings him to the police. Later, S brings a complaint against C for the injuries. C alleges that he was exercising the authority granted to him by procedural criminal law to arrest *in flagrante delicto*, and that he committed no crime because he used necessary and proportionate force in that arrest. The judge will then consider whether the means C used to effect the arrest (to hit S in the face) were strictly necessary, and whether the harm produced (the broken nose) was proportionate.

In the following we will see the meaning of this authority granted to citizens to use coercion, and understand how and why the law invests citizens with this ability and what its limits are.

Article 53 Sv

The Criminal Procedure Code provides for citizen's arrest in Title IV, among other coercive means (*dwangmiddelen*). As we saw earlier, by virtue of the legality principle, the rights and liberties of citizens are inviolable except

where the law provides explicit authority. Citizen's arrest is one of these authorities granted to citizens in the context of a criminal procedure. Just like other coercive means, citizen's arrests affect the rights and liberties of citizens before sanctions or punitive measures are imposed (Corstens, 2011).

The term 'authority' refers to a region of competences or capacities, which is exceptional because it would not exist without explicit legal permission. In this case it is exceptional because when the law recognizes rights and liberties for citizens, it guarantees that their rights and liberties will not be violated without consequences. Citizens may voluntarily resign some of those liberties, but infringements of them will be punished unless the law establishes exceptions, and 'authorities' are one of those exceptions. Coercive means are capacities granted to certain persons during criminal procedures to transgress the limits of civil liberties – in many cases also using physical force – to discover the facts and give effect to the substantive criminal law.

Coercive means comprehend measures with different procedural goals, such as to collect and secure evidence, establish the identity of the perpetrator or to ensure that the eventual sanctions are effective (Corstens, 2011). In the procedural law system, in principle the authorities can be regarded as arrayed in a sequence, where the broader their capacities or the more drastic the measures they are authorised to take are, the higher the degree of suspicion required and the higher the rank of the official empowered to make use of them (Baaijens-van Geloven and Simmelink, 2002).[40] The authority for citizens to arrest in *flagrante delicto* lies at one end of that continuum. Citizens are endowed with fairly limited capacities to take modest measures: namely, to apprehend and immediately deliver a person to the investigative authorities, in cases where the degree of suspicion is the highest possible.

Art. 53 Sv states:

> *When a crime is discovered in flagrante delicto, everyone has the authority to effect and arrest.*

[40] This principle certainly applies to the conduct of searches of places: a vehicle may be searched by a policeman, but a house may only be searched by an investigating judge (in certain cases the prosecutor) or by a policeman with a proper authorization to do so. If we look at the authority to arrest, however, policemen are authorised to do more without additional authorization. In case of *flagrante delicto* they may search a house to locate the suspect when this is urgently necessary. This principle thus, recognizes exceptions. See Arts 55 and 55a Sv.

In such a case, the public prosecutor has the authority to transport the suspect after the arrest to a place for hearing, or to order the arrest and transport.[41]

If the arrest is effected by another investigation officer, then this shall provide that the arrested suspect is promptly transported before the public prosecutor or another of his investigation officers.

Given the arrest is effected by someone else, he must promptly deliver the arrested suspect to an investigating officer together will all the seized goods, the investigating officer must proceed in accordance with the prescriptions of the former paragraph, and if necessary, with Arts. 156 and 157.

The Criminal Procedure Code provides in Art. 53 Sv that everybody has the authority to arrest a suspect in *flagrante delicto* (*heterdaad*). In cases where citizens arrest a suspect (Art. 53, 4 Sv), they must promptly deliver the person to the investigating officers, along with all seized goods (Art. 95 Sv).[42] The law does not establish what 'arresting' means but the MvT explains that it consists of the deprivation of the suspect's freedom with the aim of conducting him to the police or a judge.

The authority to arrest therefore involves a power to stop and restrict the mobility of a suspect and to make use of some physical force to arrest and hold the suspect securely (Van der Hulst, 2005: Art. 53-2-6 Sv). Arrest in *flagrante delicto* differs from other forms of arrest in that the latter can only be effected by investigating officers following a pre-trial arrest warrant. Citizen's arrest, however, can be effected before any investigating officer is involved in the investigation.

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41 [1.] *In geval van ontdekking op heterdaad is ieder bevoegd den verdachte aan te houden.*

[2.] In zoodanig geval is de officier van justitie of de hulpofficier bevoegd den verdachte, na aanhouding, naar eene plaats van verhoor te geleiden; hij kan ook diens aanhouding of voorgeleiding bevelen.

[3.] Geschiedt de aanhouding door een anderen opsporingsambtenaar, dan draagt deze zorg dat de aangehoudene ten spoedigste voor den officier van justitie of een van diens hulpofficieren wordt geleid.

[4.] Geschiedt de aanhouding door een ander, dan levert deze den aangehoudene onverwijld aan een opsporingsambtenaar over, onder afgifte aan deze van mogelijk in beslag genomen voorwerpen, die dan handelt overeenkomstig de bepalingen van het voorgaande lid en, zo nodig, de artikelen 156 en 157.

42 The arresting citizen has the authority to seize items carried by a suspect, but not to search the suspect's clothes. Only police officers and higher investigating authorities have the authority to conduct searches (Art. 56 Sv).

V. Case Study: Drawing a sharp line between citizen's arrest and *eigenrichting*

Introduction

This chapter aims to draw a line between illegal *eigenrichting* and citizen's arrest in four concrete cases. Drawing this line will enable me to contrast the space the law provides with the space citizens claim for themselves. In the previous chapter we learned the legal norms which, in theory, enable and constrain citizen's law enforcement. We learned the legal doctrine and the case law of the HR to understand the rationale judges apply to decide in concrete cases. I will now turn to the empirical study of how these norms are applied by the courts in four selected cases. After the two legal studies, theoretical and empirical, are finished, it will be possible to demark the limit in current criminal law between legal and illegal acts in these four cases, and to understand how the line was drawn.

This chapter thus consists of four case studies. These cases illustrate and allow the discussion of the doctrine and case law I have sketched in the previous chapter. The cases were selected following a series of predetermined criteria: they occurred in public spaces, and in all of them a citizen used physical force to stop a crime in commission. The cases were dealt with by the courts and received a definitive court decision before the end of this study, one of them was even dealt with by the HR. They were selected because they illustrate concrete problems in the application of the principles of proportionality, necessity and immediacy, and because they were viewed as controversial by the public.

The case study includes a description of the cases,[43] their proceedings and a commentary, where I analyse the arguments put forward during the case. This analysis will show how 'the legal space' for citizen's arrest was defined in the case, paying attention to the arguments introduced by the various parties.

The chapter ends with conclusions, which, benefitting from the theoretical study and this case study, delineate the current divide between legal citizen's arrest and illegal *eigenrichting*.

The AH case

In August 2002 in West Amsterdam, two supermarket employees pursued a 33-year-old man who had just attempted a robbery at an Albert Heijn Supermarket, and caught and battered him. A few minutes before, the man (Clinton) had grabbed a teller at the supermarket from behind, and holding her tight, grabbed money from the cash register, escaping with €540. The

43 The names have been changed.

owner (Snippe) and the manager of the supermarket (Speelman) chased after Clinton into a park. A couple of times during the run, Clinton stopped and confronted the men. The first time, Clinton threatened Snippe with a knife, threw the money away and ran. The second time Clinton confronted his pursuers, he threw his knife away, which was when Snippe knocked him down and Speelman captured him, pressing him to the ground. While Speelman held the man tight, Snippe searched his clothes and after finding money inside one of his pockets, he punched Clinton in the face with his clenched fist, causing his nose to bleed. After a few minutes, a group of people surrounded the men. The atmosphere remained tense when the police arrived 20 minutes later, with the arrested man and Snippe yelling at each other. At a certain moment, Snippe rushed at Clinton, who continued to lie on the ground handcuffed, and gave him two hard kicks in the leg. When taken to a police station, Clinton reported ill-treatment because his nose was broken.

The proceedings

The public prosecutor commenced her opinion by recounting the public 'commotion' caused by the prosecution's decision to bring charges against the two supermarket employees. She indicted Snippe on two counts of violence in a public place (*openlijke geweldpleging*, Art. 141 Sr) and simple battery (*eenvoudige mishandeling,* Art. 300, 1 Sr), and Speelman on one count of violence in a public place. The prosecutor found enough supporting evidence (testimonies of the victim, one of the accused and third parties) to prove that Clinton was battered while he was running, and also later, after throwing away his knife, as he lay defenceless on the ground with his hands tied. The injury (a broken nose), a consequence of the battery, was proven through the medical report. The prosecutor relied on the testimonies of the victim, the accused Snippe and another witness to prove that Speelman tied Clinton's hands while Snippe punched him in the face, and on the testimonies of police officers and other witnesses, to prove that Snippe kicked Clinton again, after the Police arrived.

Assessing the criminal liability of the accused, the prosecutor found the two men criminally liable. It was argued that from the moment Clinton discarded his knife, fell to the ground and was tied up by Speelman, the circumstances of an immediate unlawful aggression (*ogenblikkelijke, wederrechtelijke aanranding*), within the meaning of self-defence, ceased to exist. Clinton did not represent a threat, thus the use of physical force was not justified. The prosecutor also argued that the application of physical force while the man lay on the ground with his hands tied, was not necessary to effect arrest because Clinton was already arrested. The prosecution recommended in sentencing that Speelman pay a €400 fine and that Snippe be sentenced to six weeks prison in suspension, with a probation period of two years, and a community sentence of 60 hours unpaid work. In the alternative, the prosecutor recommended sentencing Snippe to two weeks in prison in suspension, and two consecutive community sentences of 28 hours and 14

hours. The Prosecutor found the reparations claimed by Clinton inadmissible.

The defence alleged that the events brought to trial began with the snatching of money from a cash register, attempted by a resilient offender, who acknowledged addiction to drugs and who had committed crimes to support his addiction before; that his nose had actually been broken for the second time (proved by a forensic report) because Clinton was a cocaine user, whose use weakened the bone-structure of the nose. The defence argued that the testimonies of the victim (Clinton) could not be considered credible because they were contradictory. In his first testimony, Clinton did not allege that he had been kicked by Snippe, but in his later testimony he said that he had forgotten it, because it did not hurt that much. The defence stated that the testimonies of the other witnesses were also contradictory.

The defence argued that the accused could either not be held responsible for the broken nose and should be found not guilty (*vrijspraak*), or were not reproachable for acting the way they did, and required dismissal of the charges (*ovar*). On the counts, the defence argued that the Dutch legal system recognises two legal categories of cases where citizens can overstep the limits of proportionality in defending themselves: the improper use of self-defence (*noodweerexces*) and psychological *force majeure* (*psychische overmacht*). Retailers are citizens who lack the skills the police have to effect arrests or defend themselves effectively, but who must nevertheless act because the police is not able to arrive quickly after every robbery. It was understandable in that case that the accused lost control over their emotions and used force which overstepped the limits of the law.

On the basis of the reconstruction of the events presented by the prosecution, the trial judge (*Politierechter*) sentenced the owner of the AH outlet on the battery charge to pay a fine of €600, and declared Speelman not guilty (*vrijspraak*), because it could not be proven that he had committed a crime; he only restrained Clinton's movements until the Police arrived. The decision was not appealed.

Commentary

The case became very famous in 2003 when a public prosecutor brought charges against the two supermarket employees. Citizens, politicians from different parties and even Prince Bernhard,[44] discussed in the press whether the pair should be held liable. The defence and the prosecution debated whether the men's actions could be justified or excused for exceeding legal limits, or whether they were criminal. In the public debate, some condemned the justice system for pursuing citizens who had 'defended themselves', while being itself unable to enforce the law (NRC

[44] Male consort of former Queen Juliana, the grandfather of current King Willem-Alexander.

Handelsblad, 01.10.2003:3). Prince Bernhard finally paid the fine imposed on the supermarket employees, and the same supermarket paid the costs of the trial (De Telegraaf, 01.11.03).

The prosecutor's indictment, however, turns on the argument that the two men used force and caused harm when Clinton had already been arrested and was defenceless: the robbery was over, he was neither attacking the supermarket employees (no self-defence situation), nor was he resisting arrest (no citizen's arrest). The prosecutor did not present arguments against any eventual defence-excuse, such as the improper use of self-defence or psychological *force majeure*. Clearly, the prosecutor assumed that from the moment the aggression finished and time passed, the supermarket employees could not argue that their reaction was the 'direct' consequence of emotions produced by the aggression. There was time enough for them to calm down. Nevertheless, one man battered the arrested suspect and the other enabled the battery by restraining the man.

The defence organized its strategy on the basis of defence-excuses. It turned on the argument that the men acted while overwhelmed by emotions either produced by the aggression (improper use of self-defence) or by the heat of the arrest (psychological *force majeure*).

The trial judge convicted on a finding of battery and violence in the public domain, and even though we cannot know the arguments put forward by the trial judge because they are not in the case file (*verkort vonnis* of Art. 365a Sv), the decision to set aside the defence-justifications and excuses, in my opinion, is coherent with the jurisprudence and case law on the topic.

The men did not act in self-defence, because there was no 'imminent unlawful aggression' they could have been reacting to. There had been a self-defence situation in the supermarket, but this had ceased by the time the men used force on Clinton. They were in fact reacting after the aggression had concluded, possibly to arrest the suspect. However, just as the prosecutor observed, the men were not charged on account of the force they used to cause Clinton to fall to the ground and restrain him (force used during the arrest), but for the force used after Clinton was defenceless on the ground. Only defence-excuses were available to the accused, but they did not succeed either.

For an Art. 41,2 Sr (improper use of the self-defence) argument to succeed, the extensive use of force must be a direct consequence of overwhelming emotions, and these emotions must be the direct consequence of the unlawful aggression. For a finding of late (*tardief*) improper use of self-defence (De Hullu, 2012:316), only a short time can pass between the aggression and the reaction. The reaction must follow directly (in a 'fluid' way) after the aggression. Improper self-defence cannot be found, for instance, when a person pursues an aggressor, after the latter has finished his attack, and stabs him with a knife in the back (Knigge and De Jong,

2003:175). In this sense, the HR convicted a man who attacked his former aggressor while the latter was trying to run away after hitting the first. The HR found that the defendant's reaction was not a direct consequence of the emotions produced by the aggression.[45] Coherent with this, in the supermarket case, the men were convicted because the court considered that they had the time to and should have calmed down after the aggression had finished.

Similar arguments apply to psychological *force majeure*. The excuse-defence requires two conditions: psychological pressure, and that this pressure should become unbearable to the person adopting the defence. This means that the person cannot reasonably offer any resistance to it, or that the pressure be such that the law could not require a different response from an actor. Hazewinkel-Suringa (1995:296) interprets this legal requirement in clear terms: legal systems require that citizens resist 'temptation and pressure', meaning that they do not simply succumb to their temptation to commit a crime. In the case in question, the supermarket employees were called upon to exercise self-control instead of giving vent to their emotions and harming the arrested man, because time had passed and they were holding the man restrained and defenceless on the ground.

The case of the robbery at a Tilburg jewellery shop

In late February 2002 in Tilburg a man died in a police-cell after being arrested for a robbery at a jewellery shop. That day, two men had entered a shop belonging to Mr. Kuipers, while four of his employees were at work. The owner of the shop was sitting in his office, located on the second floor, with his wife and two friends. Upstairs, there were monitors showing the movements on the shop floor.

In the office, the jeweller's wife was sitting so that she was looking directly at the monitors, while the jeweller could not see them. At one point, she looked away from the monitors, looked at him in terror and screamed. Kuipers stood up from his chair and, without looking at the monitor, assumed that something serious was going on downstairs. He ran to the safe in the next room, took a gun from it and went to the stairs. On his way, he loaded the gun.

In the meantime, the four employees had been forced to lie on the floor at gunpoint. The robbers broke the panels of a display case with a hammer and began to pack the jewellery into a bag.

Kuipers found the goldsmith coming up when he reached the stairs, and the goldsmith told him the robbers were armed. Kuipers prepared himself to shoot and went down the stairs to the shop. Arriving downstairs, he saw his employees lying on the ground and two unknown men. One of them was

[45] HR 22 November 1949, NJ 1950, 179.

beside the display cases, his back to Kuipers; the other stood next to the stairs, holding a gun in one hand, pointing at the ground. According to the employees' testimonies, they were all lying on the floor when Kuipers arrived. Neither the employees nor the two men could see Kuipers at the moment he entered, and nobody heard any warning. Kuipers testified that he shot twice directly at the man by the stairs and twice at the man by the display cases. The man beside the stairs took a bullet to the back of his shoulder and fell to the ground, while the other left the shop at a run. From the testimonies of Kuipers and his goldsmith we know that without any delay, Kuipers walked to the lying man, took his gun and gave his own gun to the goldsmith, requesting him to hide it along with the spent cartridges he had collected from the floor. Kuipers had no permit to possess or use firearms.

When the police arrived four minutes later, Kuipers was pointing at the prone suspect with the gun of the same suspect. He, and the witnesses present, omitted to mention that Kuipers had shot the man, let alone that the man had fallen after the shot. There were no signs of blood visible on the suspect. With the police having taken control of the situation, Kuipers kicked the arrested man in the head before the police took him into custody.

The man died 45 minutes later in a police cell. No one heeded the arrested suspect's request to be taken to hospital, because no one knew he had been shot, there was no blood or signs of wounds on the arrested man. Kuipers was arrested the same afternoon on a charge of grievous bodily harm (*zware mishandeling*). The police searched for the other robbery suspect, arresting him some time later.

The proceedings

In April 2003 the public prosecutor in Breda brought charges in his indictment against Kuipers for: 1) voluntary homicide through intentionally shooting (Art. 287 Sr) and after shooting, for intentionally omitting to assist or report that the first of the robbers needed medical help (Art. 450 Sr); alternatively, for negligent omission to report that the man needed medical assistance after being shot, which caused his death (Art. 307,2 Sr); 2) attempted voluntary homicide through shooting at the second robber (Art. 45, 287 Sr); 3) attempted voluntary homicide of the prone man (Art. 45, 287) by kicking him in the head, and alternatively for attempted actual bodily harm (Art. 45, 302,1 Sr) or battery (Art. 300 Sr); and 4) illegal possession of firearms and ammunition.

For practical reasons,[46] from this case I decided to study only the acts of the jeweller with respect to the first suspect, the one he shot down, and the act

[46] The aspects of the case excluded from the study, relate to legal questions beyond those drawing the limits between citizen's arrest and *eigenrichting*. The case, moreover, could not be used in all its complexity in the empirical social research,

of shooting (the first part of the first charge). Later, during the empirical social research, I will also study where people set the limits with respect to this action and their arguments for doing so.

When assessing whether Kuipers was criminally liable for shooting at the first suspect, the prosecutor remarked that in carrying a firearm and entering the shop,[47] Kuipers left himself open to a confrontation with the robbers; that this was a brave decision but also a very risky one, because his employees could have also been wounded. The prosecutor argued, however, that while shooting, he was acting in self-defence (Art. 41 Sr). Kuipers was reacting to an immediate unlawful aggression and his reaction was proportionate and necessary. The prosecutor argued that even though the suspects were not actively threatening Kuipers' employees when he fired, the employees were being compelled to lie on the floor at gunpoint, under persistent threat, and that the shots were proportionate. The prosecutor also argued that Kuipers could not have made use of a less harmful means in his reaction. Even though his reaction was drastic because he shot first, the prosecutor considered that it was a necessary act of defence (justified) and argued for his acquittal. The lack of permission to possess weapons, based on case-law, did not affect the qualification of his act as self-defence.

In his statement of defence Kuipers also argued that he fired in self-defence. He alleged that the robbers entered his shop holding a firearm with which they threatened the employees in the shop. The aggressors had been using at least one firearm, putting lives in danger. Because the aggressors were using at least one firearm, no means with less harmful potential than a firearm could have been effective in self-defence to stop the robbery and rescue the people threatened. Kuipers argued that his act of firing was in self-defence and as such, proportionate and necessary. If he had exceeded the limits, he argued, he did so under circumstances of great emotional pressure, within the meaning of the improper use of self-defence (*noodweerexces*).

In May 2003 the trial court in Breda found that Kuipers shot in self-defence, dismissing the charges brought for the act of shooting, and sentenced him to three conditional months in prison and 200 hours community service on the charges of illegal possession of a firearm and ammunition.

When evaluating the viability of the self-defence argument, the court expressed its concern about the frequent cases of armed robberies in jewellery shops and recounted that Kuipers had been robbed before. Following the prosecutor's recommendations, the court dismissed the

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because the respondents had to be confronted with a single question about the limits of citizen law enforcement in each vignette.

47 During the investigations, the police seized Kuipers' gun and he admitted having used it.

charges (*ovar*), finding that Kuipers acted proportionately and out of necessity in shooting the man on the spot.

The court acquitted him of the charges of homicide through intentionally omitting to assist or report the robber's wounds in the face of the need for both. From the evidence, the court found that the robber's wounds were not noticeable, that the jeweller could not have given the medical assistance needed as he lacked the required skills to do so, and that even though he might have known that the man had been wounded because he was a member of a shooting-club and shot from a short distance, he did not have the legal obligation to report that he had shot the robber to the police officers because he had the right not to self-incriminate, because he had used an illegal firearm.

No appeals were brought so the case was never revisited by a higher court.

Commentary

This case received some public attention in early March 2002 when the jeweller was arrested after the death of the man in the police cell. Again, citizens and politicians expressed their opinions to the press, complaining about the arrest. The Dutch Association of Jewellers criticized the criminal justice system for acting against a jeweller who used a gun to defend his property when robbers are increasingly resorting to guns (NRC Handelsblad 03.09.02:3).

Distinct from the other cases studied here, there was no great disagreement in arguments between defence and prosecution. They argued that the jeweller could not be held criminally liable for the man's death, because he acted in self-defence. However, as we will see, the opinion of the prosecutor and the decision of the court did not correctly assess all the relevant issues in the case. These deficiencies mean that the final court decision, in my opinion, departs from standards established by the HR.

The prosecutor found that Kuipers fired in self-defence, because he fired at the moment of aggression – at least one armed man was threatening his employees and his accomplice was stealing material goods – and that he shot while the threat persisted. To the prosecutor, the lives of four persons were being threatened with a gun and hence, shooting was proportionate to the threat and necessary too. In my opinion, however, a few of the same prosecutor's remarks in his indictment contradict his own arguments, as evidence is not considered. Three aspects were in my opinion not sufficiently examined neither by the prosecutor nor by the court decision.

First, the prosecutor remarked that the jeweller 'brought himself into a confrontation with the armed robbers' (Indictment 4). The robbers were in control of the situation downstairs and the jeweller, along with the other people mentioned, were safe upstairs. Kuipers 'then took a risky decision to go downstairs with a gun', said the prosecution, because 'the shot could be

directed against him and the people in the shop'. The prosecutor nevertheless, did not follow this same reasoning to consider that the danger of provoking a gunfight was actually increase by Kuipers entering the shop armed. On the contrary, both prosecution and the court concluded that directly shooting at the man in the back of his shoulder was necessary.

Second, from the evidence collected, the prosecutor and the court knew that the armed man in the jewellery shop was actually pointing his gun at the ground when Kuipers entered the shop (Indictment 3). Although the divide between simple 'fear' and 'imminent danger' of harm is very weak, Noyon (Noyon, Langemeijer, et al., 2003, Art. 41-13) considers that the act of raising a knife or a gun against someone could be seen as an imminent danger. However, in the case, the man was pointing his weapon at the ground and in addition, he had his back to the door the jeweller entered through, thus he could not see or perceive that he could be in danger, meaning that the 'acuteness' of the situation was not as severe as found.

The same jeweller pointed out that the man could not see him entering, because the man was unaware there was a back door to the shop. That is the reason why when the jeweller fired, the bullet entered through the back of the man's shoulder and travelled forward into his chest (forensic report in the case). Taking this into account, the jeweller had two advantages over the aggressor: the aggressor was secure and was not pointing at anyone with his gun, thus the situation was less acute, and the aggressor could not perceive that someone was about to initiate an act of defence, so he was also not under any pressure to open fire.

To finish, neither the prosecution nor the court considered the fact that the jeweller was an experienced shot, trained and a member of a shooting club: someone who is thus used to handling guns and therefore more able than lay persons to master his emotions and skills in using one, rendering him more capable of directing a shot with certain precision. From this perspective, the court could have looked more critically at the question of whether the jeweller had other less harmful alternatives available to him rather than shooting at the torso, from 1.5 or 2 metres distance.

In my opinion, the court should have more strictly assessed these three aspects (the jeweller's aggressive stance which increased the likelihood of a shooting, his strategic advantage in relation to the robber, and his greater skill in shooting) to consider the proportionality and necessity of the reaction, and the *Garantenstellung* of the jeweller.

On the first aspect: we saw that even though the position of the HR evolved after the *Vreesarrest*,[48] to find that immediate unlawful dangers enable self-defence, it is nevertheless required from those taking action that they be

[48] HR 8 February 1932, NJ 1932, 617.

cautious and restrained (*terughoudend*) in using force, neither increasing the need to act drastically nor becoming themselves part of the fight. For Knigge and De Jong (2003:170), the actor must always count on the fact that the other person could desist from his attitude and avoid the escalation of the conflict, something the jeweller did not do.

According to De Hullu (2012), a judge will weigh the application of 'corrections', considering whether the actor avoided provoking or exposing himself unnecessarily to the aggression by his own conduct (*culpa in causa*). In the present case, although a robbery (with one armed man) was in course, the situation in the jewellery shop was stable in the sense that the robbers had control over the scene and the armed man was not pointing at anyone. As the prosecutor put it: the jeweller 'took a risky decision' going downstairs with a gun. Because of his position as an employer, the jeweller was obliged to provide for the security of his employees, minimizing the risks to them to suffer harm at work.[49] In this case, however, the court failed to consider that the jeweller contributed to making the situation more 'acute' for his employees by going downstairs.

We could ask, moreover, how far the jeweller was behaving aggressively rather than defensively. The Supreme Court of the Netherlands made this distinction recently in a less dramatic case. There, a man who was looking on at the sidelines of a fight in which his brother was being attacked, joined in the fight. The HR found that the acts of the defendant in that case could not be taken as 'defensive' ones but as acts directed to a confrontation or participation in the fight. Because the defendant entered the fight by hitting the others in the tumult, it could not be proved that the defendant entered the fight solely to extricate his brother from it, but rather to be part of it.[50]

In the case of the jeweller, however, the court failed to consider that if he was coming downstairs to protect the lives of his employees, he was actually putting them in greater danger. Moreover, if he was acting to protect his material possessions, armed with a gun and ready to shoot, he was intending to act disproportionately.

About the second aspect: we know the actor must always choose the least harmful alternatives to hand (necessity), and the law requires even more caution when someone tries to anticipate harm (Noyon, Langemeijer et al., 2003:Art.41-26-30). The HR interpreted this requirement quite strictly in 1985.[51] In the case alluded to, a man was waiting in his apartment for a group of men who had threatened him to arrive. He loaded his gun and sat on the couch until they entered the apartment, also carrying a weapon (a knife) with them. On their arrival, the man immediately shot the first man to

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49 Arbeidsomstandigheden Wet, Art.3,b and Art.10.

50 HR 10 February 1987, NJ 1987, 950

51 HR 25 June 1985, NJ 1986, 75.

enter in the head at short range. The HR confirmed the decision of a lower court in Aruba, assessing that the defendant's actions were not justified by self-defence. For this to be materially possible for the actor, the HR stated, he should shoot his aggressor in the legs rather than at the level of the vital organs. In our case of the robbery at the jewellery, the jeweller was anticipating the possibility of an actual shot, because he was going after a man who was pointing his gun at the ground and who could not know that someone was coming up behind him. In my opinion, it is questionable whether in the given circumstances, the jeweller could not have shot the man in the leg or the arm to disable him. In my opinion a shot to the torso at the level of the shoulder was not absolutely necessary.

On the third aspect, we should recall that certain persons, because of their legal position or special skills (such as policemen or skilled fighters), are required to exercise greater moderation than non-skilled persons (*Garantenstellung*). The requirements of necessity were therefore higher for the jeweller, because he was an experienced shot. He was required to make use of his skills to attempt the least harmful possible shot, he was technically capable of this, and the fact that the robber was feeling secure made the situation less pressing and left the way clear for him to attempt a better (less harmful) shot. In fact, the jeweller was also required to better control his emotions when shooting, because he also had a duty of care for his employees, due to his legal position in relation to them. Kelk signals that excessive reactions will be weighed differently by a judge when they are the consequence of overwhelming emotions affecting a 'normal citizen' from when they affect a person bearing responsibility over the safety of others. As an example, Kelk states that the owner of a bar is required to exercise greater control over his emotions, and seek alternatives to avoid actual harm (2005:295).

To finish, the way the prosecutor reconstructed events made it difficult in my opinion for the court to accurately examine the necessity and proportionality in the reaction. The prosecutor divided the events in the jewellery shop into two 'moments': 1) the moment of the shots and 2) the sequence of events thereafter. The prosecutor concentrated on the question of whether the jeweller was criminally liable for either intentionally or alternatively recklessly, omitting to offer help or report that the former aggressor needed medical assistance. In my opinion, the prosecution's strategy in this respect also caused the evaluation of the proportionality and necessity of the act of shooting at the torso (at the level of the shoulder) to vanish from consideration. If the missing arguments signalled above had been brought into consideration to examine whether shooting at the torso was necessary and proportionate, perhaps the conclusions of the court would have been different. Apparently, neither the prosecution nor the court were interested in such evaluations. Obviously, the defence was not.

Considering these deficiencies in the prosecutor's arguments and the considerations missing from the court's decision, it appears seriously

doubtful that the *Hoge Raad* would have considered the application of the self-defence justification appropriate, especially considering the high proof requirements the HR now imposes on lower courts in cases of self-defence.[52] In my opinion, therefore, the jeweller went beyond self-defence, because his act of shooting at the level of the shoulder, presented problems of necessity under the circumstances.

The case of the handbag snatching[53]

On 17 January 2005, a young man snatched a woman's handbag from her car, while she was stopped at a corner. Carrying the handbag, the man fled on a scooter. The woman drove recklessly after the scooter until she crashed into a tree and the scooter. Initially, it was unclear how the events occurred. In 2008 the court found that the 43-year-old woman (Ms. Geraldine) had been driving down the 3rd Oosterparkstraat in Amsterdam Oost until she stopped, at around 6.30 PM, at the corner of 3rd Oosterparkstraat and Linnaeusstraat. Then, all of a sudden, a young man (Ali el B) opened the passenger door of her car and took her handbag. The young man jumped hastily onto a scooter, driven by another young man, and they fled down 3rd Oosterparkstraat counter to the flow of traffic. Ms. Geraldine drove fast backwards after them for about 30 or 40 metres. The Oosterparkstraat is located in a residential area with narrow streets. She drove her car, turning her torso to the right to see behind her, holding the steering-wheel with her left hand. At a certain point, she could no longer see the scooter, and she thus twisted her upper body a bit further to the right. Because she was driving backwards, that movement also made her move the steering-wheel, veering the car to the right. At that moment she lost control of the car, hitting the scooter. As a consequence, the young man Ali el B fell and was dragged off by the car until it hit a tree. Ali el B died in the act. The other young man managed to escape but was arrested some time later by the police.

The proceedings

Ms. Geraldine was arrested and brought into police custody the same day. The police stated the same day that the death was the consequence of an accident (NRC Handelsblad, 01.18.05:3). Ms. Geraldine explained to the police that she had only wanted to 'touch' the scooter and did not realize that she had hit someone until she got out of the car.

On 20 January 2005 the woman was released after the investigating judge decided not to remand her in custody, as the prosecutor required.

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52 See, for instance, HR 28 March 2006, NJ 2006, 509 considering self-defence and *culpa in causa.*

53 The description of this case is based on newspaper articles, the prosecutor's indictment and the court decision, published by the press and the Internet. The case concluded with considerable delay in 2008, which is why I was unable to directly examine the criminal file.

In February 2008 the prosecutor brought charges against Ms. Geraldine for voluntary homicide (Art. 297 Sr) through conditional intent (*voorwaardelijk opzet*), and alternatively for the charges of grievous or actual bodily harm, and negligent killing in traffic (Art. 6 WVW 1994). The prosecution excluded the application of the defences of self-defence, improper use of self-defence and psychological *force majeure*, and recommended sentencing Ms. Geraldine to thirty months imprisonment (effective).

The prosecution argued that the reaction could not be justified by self-defence because the harm caused was disproportionate: causing a death to defend a handbag (material goods) meant excessive harm. The prosecutor argued that the woman was responsible for homicide through conditional intent: she knew there was a risk of causing an accident by acting in the way she did, and she accepted that risk.

The prosecution believed the woman was aware of the risks, because it is a matter of common sense to know that first, the greater the speed a car is driven at, the greater the harm it could cause to other more fragile street users; and second, that driving backwards increases the chances of accidents as it demands greater skill. In addition, the conditions on the street were highly demanding: it was a narrow street and it was already dark.

The prosecution's argument included the idea that the law places on drivers and concretely on the woman, greater requirements of caution and moderation, because of their *Garantenstellung*. She was driving a car, a means of great harmful potential, thus she was called upon to exercise greater caution. Moreover, she undertook a 'special manoeuvre' in driving backwards. Traffic rules require drivers to exercise extra caution and moderation when they initiate manoeuvres that require greater skill, as they increase the risk of accidents.

Therefore, though she did not directly intend to kill, she was required by law to act as a responsible driver, and barred from inviting excessive risk and harm. By claiming that she was driving after the scooter merely to 'touch' it, she recognized that she assumed the excessive risk and the harm she caused.

The prosecutor excluded in her opinion the application of self-defence: first, because a handbag is not worth a life. Second, because she was not acting in 'defence' of her material possessions because the bag had already been stolen and was in the possession of the young man. She sought to recover it, but from the moment her chase increased the probability of disproportionate harm which then materialised, her reaction was no longer necessary.

Neither the improper use of the self-defence nor psychological *force majeure* applied. To the prosecutor, the first could not excuse her, because her

physical integrity was never threatened, thus the emotions produced by the threat could never be such to exclude responsibility for a death. Psychological *force majeure* did not excuse her either. In such a case, the law actually expected her to resist the psychological pressure instead of giving vent to her anger.

The defence argued that Ms. Geraldine should be found not guilty on the count of manslaughter through negligent driving (Art. 6 WVW 1994) because she did not act recklessly or negligently. If the court found that she had, the charges should be dismissed because she had acted either justified by self-defence or excused by the improper use of self-defence or psychological *force majeure*. She reacted in self-defence against an illegitimate aggression (the snatching of her handbag from her car) and when she produced disproportionate harm, this happened because she was reacting driven by unbearable emotions awoken by the aggression (improper use of self-defence or psychological *force majeure*).

In March of the same year the court published its decision: Ms. Geraldine was sentenced to 180 days of community service and disqualified from driving for 6 months. The court found her guilty on the count of manslaughter through negligent driving (Art. 6, WVW 1994).

Reconstructing the events, the court believed that Ms. Geraldine drove after the scooter with the intention of recovering her bag and not to 'touch' the scooter, and as a consequence of a sudden movement of hers in the car, she bumped into the scooter unintentionally.

The court also found that though she had acted following an illegitimate aggression (a self-defence situation) no justifications or excuses applied in her defence. First, she had not acted in self-defence, because in trying to rescue a bag at the cost of a life, she had exceeded the limits of proportionality. Second, no improper use of self-defence could excuse her because she had confessed that 'she had no time for emotions' when she pursued the scooter as a reflex to recover the bag. Psychological *force majeure* did not apply either, because although she was compelled internally to pursue the scooter, the law expected from an 'average citizen' that he or she would control such impulses and weigh the risks they could produce before acting.

Commentary

The case had already appeared in the papers the day after the events in January 2005. The newspapers reported that a riot had been stopped right at its start: residents of the Oosterparkstraat had gone after the police.

Right after the incident, some residents, mainly of Moroccan origin (like Ali el B) congregated around his body. They complained that Moroccans were the target of generalized accusations of thievery and violence, and mistrusted; that Ali el B. was a victim of a murder (Trouw, 01.19.05). All this

tension originated, however, from an earlier incident in the neighbourhood. A couple of months before, Theo van Gogh had been killed a few metres away from the tree Ali el B died at.

After the incident, politicians, legal experts, journalists and the public expressed their opinions in the press (Het Parool, 01.19.05; NRC, 01.22.05; Trouw, 01.22.05; De Telegraaf, 02.08.05). The Minister of Integration and Immigration, Rita Verdonk, stated in an interview that if Ali el B had not been trying to steal a handbag, he would be still riding his scooter and the woman would still be sitting at home; that she had simply reacted to a robbery, but had not committed murder (Volkskrant, 01.18.05; De Telegraaf, 01.21.05). After complaints that Minister Verdonk was interfering in judicial affairs, Prime Minister Balkenende stated that the Minister's words could have been his own words too (Trouw, 01.22.05). For his part, the Mayor of Amsterdam city (Job Cohen) refused to allow a parade for the funeral of Ali el B, organized by the Moroccan community and his family, arguing that the death of Ali happened after he had tried to commit a street-robbery (De Telegraaf, 01.21.05).

Two years later, in March 2007, Ali el B's family protested at the delay in the case. Time had passed and the prosecutor had not charged the suspect. This was done in July 2007.

Analysing the argumentation, we conclude that both prosecution and the court coincided in feeling that no defence-justification excluded Ms. Geraldine's criminal liability. Both prosecutor and the court stated the reaction was disproportionate because she could not put lives at risk to rescue a handbag. Thus no self-defence could succeed.

Moreover, no excuses apply, because both the court and the prosecution agreed that emotions could not excuse the reaction: the woman was called upon to control herself. The court argued that the law expects from an 'average citizen' that he or she is able and indeed does control his or her impulses and properly weighs risks and proportionality before acting (thus no psychological *force majeure*). The prosecution argued something similar: the emotions aroused by the theft of the handbag could never be of such magnitude as to excuse someone for putting lives at risk. In her *Garantenstellung* as a licensed driver, Ms. Geraldine was called upon to exercise greater prudence and self-control. Both the court and the prosecution applied some ideal standard to assess the case: the ideal of the 'prudent driver'. Comparing the acts of the woman with this ideal, it states that she should not have given vent to emotions, but could and should have controlled them to act proportionately. This appreciation is coherent to case-law. The HR decided, for instance in 1983, that a trained person (in that case a policeman), because of training and know-how is in principle required to comply with greater standards of self-control than the 'average

citizen'.[54] In the case of the handbag snatching, the legal position of the woman, on account of being a licensed driver in traffic and of her training, obliged her to control her emotions and avoid risks.

Determining the actual intentions of the woman at the moment of pursuing the scooter was also decisive in the case: did she try to 'touch' the scooter or was she acting on an impulse to recover the bag? This question was of major relevance to the court in ascertaining how to qualify the act – in other words, under which criminal norm could it be subsumed: voluntary homicide through conditional intention or negligent killing? Based on her testimony to the police, the prosecutor argued that Ms. Geraldine wanted to 'touch' the scooter, and thus had the conditional intention to kill. To the court, however, the testimony of the accused to the police could not prove her intention to 'touch' the scooter. The court gave greater weight to the testimony of the accused before the court, where Ms. Geraldine stated that she had impulsively driven after the scooter to recover her bag, as she had already done once previously when she had been robbed. The court found her guilty on the count of manslaughter through negligent driving (Art. 6 WVW 1994).

The fight on the bus

In September 1999 in Breda, three men engaged in an argument in a bus. After a short tussle one of the men battered another with his clenched fist and broke his nose. The three men had got onto the bus to the central station near a stadium after a soccer match. A 33 year-old man travelling alone (Ingbers) got on the bus and took a seat on the left side of the aisle. Two brothers (Koos and David Bakker) did the same and sat down on the right. At a certain moment one of the brothers (David) began to throw potato chips through the bus window. Ingbers, who was seated nearby, about a metre away from them, reacted by saying: 'Do you also do that at home?' One of the two brothers, Koos Bakker, answered: 'Are you an environmentalist?' The latter threw chips at Ingbers and said he and his brother would beat him up when they reached the central station. Suddenly, both brothers stood up and Koos moved towards Ingbers to stand right in front of him. Ingbers stood up also. The bus was carrying a crowd of people directly to the central station. Koos bumped his chest into Ingbers' chest at the same time as Ingbers raised a clenched fist and hit Koos in the face. As a consequence, Koos's nose began to bleed, having been broken. Once all of them had been brought to the police station, Koos reported the battery to the police.

The proceedings

In February 2000 the three men and a couple of witnesses appeared before the trial judge in Breda. Ingbers was indicted for assault. The first count

54 HR March 1, 1983, NJ 1983, 468.

alleged actual bodily harm causing grievous bodily harm, for breaking Koos's nose (*zwaar lichamelijk letsel, althans enig lichamelijk letsel*, Art. 300, 1, 2 Sr). When examined before the trial judge, Koos and his brother testified that Ingbers aggressively approached them in the bus to attack them. Ingbers countered that the two brothers came over and stood in front of him threateningly, and he had thus hit Koos before Koos could hit him. Two witnesses brought by the defence stated that the two brothers looked drunk and the suspect looked quiet, that the two stood up after threatening Ingbers and that the latter stood up and gave Koos a punch in the nose to prevent Koos from doing it first. The other witness added that Koos managed to raise his hand before Ingbers hit him and that Ingbers did it because he could not escape in any direction in the bus.

The defence argued that the suspect acted in self-defence: he did not have a duty to retreat from the disagreement; he was doing something every citizen should do, admonishing others for their misbehaviour in public; that they had threatened and wanted to batter him (which meant an immediate unlawful aggression); and that he had struck in self-defence because he had no way to escape his assailants.

The trial judge decided from the evidence that the repeated threats and the approach of one of the two men indeed amounted to an immediate unlawful aggression, that Ingbers was not the first to stand, and that the defendant had acted in self-defence because he had no way of escaping in the bus. The charges on the count of actual bodily harm against Ingbers were dismissed (*ovar*) because his conduct was justified.

The prosecution appealed against this decision by arguing that Ingbers sought confrontation by making his reprimand and did not try to avoid the confrontation with the brothers, but by standing up, showed himself willing to fight.

Before the Court of Appeal in Den Bosch, Ingbers maintained his previous account of the facts, adding that if he had tried to escape, the men in the bus would have attacked him from behind, and that he had thought Koos was about to strike and therefore struck first. The *Advocaat-Generaal*[55] of the Court of Appeal required the court to revise the trial judge's sentence and condemn Ingbers to two weeks conditional imprisonment with two years probation, given that the suspect admitted at trial that he had struck before seeing that his assailant was about to attack. It was argued that mere 'fear' is not enough for self-defence.

The defence argued that Ingbers experienced the bumping of chests as threatening behaviour, that this meant a danger of immediate unlawful

[55] I use the Dutch term '*Advocaat-Generaal*' to distinguish this from 'prosecutor', a term I use for those who act at the regional and district offices (*ressortsparketten*) of the public prosecution service.

aggression, and that according to the testamentary evidence, the situation was threatening and the suspect had no way out, meaning that striking first was a necessary and proportionate reaction.

The court reversed the sentence, considering Ingbers could not prove that he had been threatened by an imminent unlawful aggression, and moreover, he had not chosen to avoid the aggression despite having had the chance to do so. The court found the reparations claimed by Koos inadmissible and remitted them to the civil judge. The court released him of the charges of actual bodily harm but sentenced him to two weeks conditional custody on the charge of battery (*mishandeling*). Ingbers appealed the decision, going in cassation to the *Hoge Raad*.

Before the *Hoge Raad*, the defence attacked the arguments of the Court of Appeal as being contradictory and lacking sufficient reasoning, within the meaning of Art. 99 Wet RO, and put forward three arguments: 1) that there was sufficient evidence (a witness statement) to prove that the appellant did not act solely out of fear, but that there was 'danger of an imminent unlawful aggression since Koos had raised his hand', that the bumping of chests was threatening enough for him to reasonably think he was about to be assaulted, and that the bumping already amounted to an imminent unlawful aggression; 2) that the fact that the appellant did not see his assailant raising his hand did not mean the imminent danger was not proved, as it was perceived by other witnesses; and 3) that Ingbers did not have the duty nor the opportunity to avoid the conflict, that the duty to avoid the conflict is only prescribed under favourable conditions not present in the case, and that he factually had no way to escape from his assailants in the bus.

The *Advocaat-Generaal* exhorted the *Hoge Raad* to confirm the sentence, stating in cassation that the HR cannot deal with questions of evidence, thus rendering it improper to continue to discuss whether Ingbers had reacted out of fear or to an imminent unlawful danger. In the eyes of the *Advocaat-Generaal*, from the moment the court had found that there had been no imminent unlawful aggression, there was no need to discuss whether the defendant had tried to avoid an escalating conflict, because the same situation was no longer qualified as a 'self-defence situation'. Finally, the *Advocaat-Generaal* found Ingbers's argument that an imminent aggression existed because witnesses saw it though Ingbers did not useless, because the law requires an intention on the part of the actor to defend himself for self-defence to be found. Given that Ingbers could not perceive that he was being threatened, his intention must indeed have been to strike first.

In June 2002 the *Hoge Raad* concluded that the grounds for the Court of Appeal's decision were indeed contradictory: the Court of Appeal convicted Ingbers because he had reacted in a situation that did not at that point yet have the character of an imminent unlawful danger, but in the same decision, the court stated that Ingbers could and should have tried to avoid escalating the conflict. The Court of Appeal was therefore simultaneously

blaming the defendant for not trying to escape an aggression that it stated elsewhere was not an aggression at all. In doing so, the court denied and, at the same time, assumed there was an imminent unlawful aggression against Ingbers. The grounds for the decision which the court put forward were thus found to be contradictory and the case was remitted for retrial to the Court of Appeal in Arnhem.

In November 2002 the *Advocaat-Generaal* requested that the Court of Appeal in Arnhem dismiss the charges against Ingbers, persuaded by the HR's reasoning. The court did so, arguing that given the words exchanged between the parties, the threats the brothers made to Ingbers and the fact that they came over to stand in front of him in a threatening manner, Ingbers had felt himself under threat. This did not constitute an actual aggression but was already an imminent threat, thus permitting the finding that he had reacted in self-defence. The criminal charges against Ingbers were therefore dismissed (*ovar*).

Commentary

Something particular to the present case is that as the proceedings evolved, the parties used different arguments to solve three subsequent questions: 1) whether the defendant was acting in a self-defence situation, 2) whether the reaction was necessary and 3) whether Ingbers had provoked the aggression.

Before the trial judge, the arguments of the parties mainly turned on the first two questions. The defence argued that Ingbers was about to be attacked by one of the men (there was an 'imminent unlawful aggression'), thus he then reacted by hitting because he had no way to escape from the aggression on the bus (absolute necessity). The trial judge assumed as proved the self-defence situation and accepted from the evidence that Ingbers could not escape from the confrontation.

However, the prosecution did not agree with the assumption that the reaction was necessary. The prosecutor asserted that Ingbers provoked the situation with his comments (*culpa in causa*) and did not try to avoid the confrontation (necessity) but showed his willingness to fight by standing up to face his aggressors.

Before the Court of Appeal, nevertheless, the arguments changed. The line of reasoning of the *Advocaat-Generaal* turns on a new argument attacking the temporal appropriateness of the reaction. In the eyes of the *Advocaat-Generaal*, Ingbers had not yet needed to react as he had, as he had struck out before the aggression was imminent: he could not see Koos raising his hand, he reacted too early, out of 'fear', and there was no immediate unlawful aggression. The defence countered the prosecution's new argument by pleading that the bumping of chests was 'perceived' as very threatening by Ingbers, and which was already an unlawful aggression from which he could not escape. Striking was a necessary reaction.

In my opinion, the defence at this point did not use the best arguments at hand in this matter: despite arguing that the young men's threats and the bumping had already amounted to an immediate unlawful 'danger', assimilated by case law into an 'aggression',[56] the defence argued that the bumping of chests was 'perceived' as an aggression and tried to prove this by resorting to witness testimony. In doing so, the argument that an imminent 'danger' is equivalent to an 'imminent aggression' and justifies a defensive reaction vanished. The defence concentrated on proving the plausibility of the perception of the danger, rather than that the proven facts amounted to immediate unlawful aggression, which made the reaction necessary. The court therefore then went on to prefer the *Advocaat-Generaal*'s argument that there had been no 'unlawful aggression'. The subjective perception of Ingbers that he was in danger did not suffice. The court added that he had not sought to avoid the confrontation when he was aware of the 'escalating conflict'. The court found him guilty.

Before the *Hoge Raad*, the defence targeted the contradictions in the previous court's decision, at which point in my opinion, the defence put forward its best arguments. The defence admitted there had been an escalating conflict in the bus, but argued that the situation meant a 'danger of an unlawful aggression'. Ingbers acted in self-defence and reacted using force at the right moment, because it was neither possible nor wise to escape in that situation. In turn, the *Advocaat-Generaal* avoided all discussion of the temporal appropriateness of the reaction (was it only 'fear' or an 'unlawful aggression'?), reminding the supreme court that it could not revise matters of evidence in cassation. However, the *Advocaat-Generaal* regretted the court's remark that Ingbers had not tried to escape from the aggression when it also stated that there had been no aggression. The HR found the Den Bosch court's decision indeed contradictory, because it used arguments that excluded each other: when deciding that the appellant should have avoided the conflict, it was assuming that there was an 'immediate unlawful aggression', which the same court denied in its first point of decision. The HR remanded the case to another Court of Appeal, which later decided that the appellant reacted justifiably to an 'unlawful danger of aggression'.

Commentators on the case tried to uncover behind this decision a new stance adopted by the supreme court which broadened the meaning of 'immediate unlawful dangers' to embrace threatening attitudes, considering them 'the beginning of an aggression' (Knigge, 2002:11). Buruma, commenting on the same case, asked whether the HR was not giving a new meaning to the principle of absolute necessity, now allowing 'pre-emptive strikes' (Buruma, 2003:117).

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[56] De Hullu 2012, HR 2 February 1965, NJ 1965, 262.

An answer to this question came later in a case known as the *Juliëttebende*.[57] In this case, the Supreme Court encouraged the lower courts not to interpret the terms 'immediate threatening danger' restrictively by automatically concluding that striking first (in that case, shooting first) is never justified. Judges must still evaluate the evidence to determine if the threat was about to become an actual aggression, in order to deliberately base a decision. To Knigge (2002), a harmful reaction in advance of a concrete physical aggression begins could also be justified as self-defence, when the seriousness of the threat makes it evident[58] that an actual aggression and harm is about to happen. If harm is evidently about to happen, striking in advance would be necessary, thus justified.

Conclusions

The case study aimed at drawing the line between the lawful and unlawful uses of physical force by citizens to arrest suspects.

Studying legal principles and case law as they specifically apply in four selected cases allows me now to draw the main line dividing lawful (non-punishable) citizen law enforcement from unlawful (punishable) *eigenrichting*. This line may not reflect the complexities that other cases, with all their factual details, present for judges, neither the shifts that legal criteria have been experiencing. It suffices, however, for citizens who are not aware of legal trends and details, to distinguish what the 'law in the books' allows and what it does not, in using physical force to catch a suspect in the act.

The AH case of the robbery at a supermarket depicts the problem of the temporal limits to harmful uses of force in citizen law enforcement. This is what I called the principle of 'imminence', which requires that the threat, the resistance from the suspect or the aggression against which someone acts is either present or about to begin at the moment of reaction, but must not be concluded. If the suspect is defenceless, offers no resistance or simply escapes, no force may lawfully be used anymore. The principle applies to punish on the one hand pre-emptive strikes (striking before an aggression begins) and retaliation on the other. The mentioned case helps to clarify up to which point a person may react and produce harm, without being found to have commenced with retaliation.

As we saw in the AH case, two men (the owner and manager of a supermarket) ran after a man suspected of threatening and robbing money from a cashier at the supermarket. The men caught the suspect a few hundred meters away from the supermarket. While one of the men held the suspect tied on the floor, the other hit the suspect in the face, breaking his

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57 HR 21 December 2004, LJN AR3687, NS, 15.

58 Knigge (2002) speaks of the '*denkbeeldigheid*' (reasonable appearance) that an aggression is about to begin.

nose. The decision in this case makes it clear that the use of force by citizens can only be justified (as self-defence) as long as the aggression persists or when the suspect actively resists arrest (citizen's arrest). If someone uses force harmfully after that, he or she could only be excused (improper use of the self-defence) if the use of force happens immediately after the aggression finished, but not after time passes. The improper (excusable) reaction must follow the aggression in a 'fluid' way and as a consequence of the overwhelming emotions produced by it. The decision also shows that although the arresting citizen can argue that he caused harm to the other person (the suspect) while driven by emotions which arose during the arrest or after the aggression (psychological *force majeure*), the arresting citizen must prove the emotional pressure was unbearable. For judges, deciding if the pressure was unbearable demands looking at the circumstances of the case, the personal story of the defendant, and to construct an image of what an 'average citizen' would be legally allowed to do.

The case of the robbery at the Tilburg jewellery shop depicts the issue of necessity in terms of the means used for self-defence. The absolute necessity principle requires that we always use the least harmful means available. If a person has the opportunity to use lawful or harmless means in his own defence, he is required to do so. If he cannot, he must ensure that he causes the least possible harm. It helps clarify the question of when lethal means are necessary while at the same time adding the question of how heightened skills count. In the case of the robbery at the Tilburg jewellery shop, the jeweller, entering his shop through the back door, reacted to a robber armed with a gun. The jeweller shot the suspect while he had his back turned to him and his gun pointed at the floor. The court decided that the jeweller acted in self-defence. After analysing some missing considerations in the court's decision and looking at the current case law, however, I concluded that the jeweller acted beyond necessity. In a self-defence situation while an aggression is taking place, a person is justified in using harmful means within necessity, which means what is strictly necessary to counteract the attack. In the given case, a lethal shot to the torso was not strictly necessary because of two circumstances. First, the jeweller had a strategic advantage over his aggressor because the former controlled the situation while the latter had his back to the jeweller (and, thus, could not see him entering). Moreover, the aggressor had his gun pointed at the floor. Second, the jeweller was a skilled shot and shot from a distance of no more than a metre and a half from his aggressor. Taken together, both circumstances could have allowed the jeweller to have attempted a less harmful and still effective shot at the aggressor (such as at the legs) than he actually did. In addition, in my view, if the jeweller claimed that the shot was necessary to save the lives of his staff, it could be argued that this had become necessary only after the jeweller had entered the shop with a gun in his hand. In the case, the prosecutor pointed to the fact that the jeweller actually increased the risk of a shooting by his own intervention.

The case of the handbag snatching deals with the problem of proportionality in the use of force in citizen law enforcement. The proportionality principle requires that reactions do not inflict more harm when they are compared to the harm the attack could cause. It helps clarify the meaning of the principle by analysing, specifically, proportion in a conflict of interests between material goods and the physical integrity or life of a suspect. In this case, a woman drove backwards while chasing a young man on a scooter who had taken a handbag from the passenger seat of her car. She drove hastily against the flow of traffic until she crashed into a tree crushing the scooter and killing the driver. The decision of the court in this case clarifies that it was disproportionate (no self-defence) to put lives at risk to rescue material goods, such as a handbag. The court decision also clarifies that the emotions which a handbag snatching can produce cannot be relied on as an excuse for putting lives at risk (no improper use of self-defence). The same applies to the emotions the chase may arouse. As an 'average citizen' it was not reasonable to lose control over her emotions (no psychological *force majeure*). Moreover, the requirements of prudence and self-control apply to the defendant. As a skilled driver she would have had to act as a 'prudent driver'; but as she drove recklessly and produced excessive harm, she was responsible for manslaughter.

The case of the fight in the moving bus also depicts the issue of the temporal limits to the harmful use of force but, in addition, it helps clarify the question of when a person can begin to use force without committing a pre-emptive strike. In this case, as we saw, one man hit another in the face when, after a verbal argument, the latter approached him and bumped him in the chest. The decision in this case clarifies that in a conflict situation, where there is an obvious danger that harm is about to be inflicted, a person is allowed to inflict harm in self-defence if he or she had no way to avoid or escape from the fight.

VI. Mapping the social space for citizen law enforcement

Introduction

The previous chapter mapped the legal space for citizen law enforcement. This chapter maps the social space.

According to socio-legal theory, people have their own notions of 'legality'. There is – in Ehrlich's words – a social space within which actions are considered desirable or approved of: a social space which may or may not coincide with the legal space mapped by the 'law in the books'. It is this social space, the 'living law', that this chapter aims to map by analysing the narratives of respondents.

In the previous chapter we saw that the limit to citizen law enforcement is regulated by a system of legal norms and principles, which generally criminalize but exceptionally allow, force in defence of legally protected interests. In general, the law grants citizens a right to self-defence and citizen's arrest in defence of legally protected interests. This legal right is granted unless the antagonist or perpetrator is harmed with other intentions. However, even when intentional, harmful actions can avoid being punishable by law when exceptions apply. These exceptions are specified in case law, e.g. exceptions on the grounds of necessity. My analysis of the legislation and case law showed that in order to establish criminal liability, the legal system operates through a complex interplay of constraining and enabling norms and principles.

The norms provide in *abstractum* for the criminalization of harmful actions, and for exceptions to that criminalization, and certain principles instruct judges in the evaluation of concrete cases. The system is not a closed and rigid one, however. Cases are not judged in a social vacuum. As my case studies showed, judges reinterpret these principles and norms in their decisions, and their interpretations vary as they evolve to expand the space of exceptions. We have seen how these exceptions free citizens from criminal liability if they react to imminent danger, and if they inflict harm which was strictly proportionate and absolutely necessary to that danger. If an actor exceeds those limits nonetheless, he or she could still be excused by taking the emotional or psychological pressure he or she suffered into consideration, or for lacking all fault in having taken all the required precautions to prevent the harm caused. Finally, we saw that the system recognizes two corrective criteria which constrain these justifications and excuses: when the actor exposes himself to the danger he or she reacted to (known as *culpa in causa*), or where special skills would have permitted him to take a less harmful alternative (known as *Garantenstellung*), which he did not.

In conclusion, we have seen that the space for citizen law enforcement in society appears to be in flux. As a result of slow but steady changes in the interpretation of legal principles, the constraining criteria of proportionality, absolute necessity and immediacy, especially for self-defence, have gradually expanded. In this chapter, we will analyse how citizens themselves refer to this limit, if at all, in their narratives on their approval and willingness to use physical force in preventing an ongoing crime.

Looking at four concrete cases dealt with by the courts, we saw how these principles and norms were applied, and in doing so we learned how the limit was drawn between lawful and unlawful citizen law enforcement.

From a socio-legal perspective, people have their own notions of 'legality'. This is the 'living law'. In this chapter, I will analyse how far people approve of or show willingness to perform actions criminalized by judges. I will thus establish whether the gap exists by looking at two things. First, I will analyse whether people merely approve of the acts of others, or express themselves also to be willing to go beyond the law. Second, I will establish whether people wittingly or unwittingly support concrete forms of *eigenrichting*. To discover whether acceptance of *eigenrichting* is indeed a prelude to a spiral of violence in society, it is necessary to determine the depth of this acceptance. Are people merely tolerating others crossing the legal line in arresting suspects, or are they themselves willing to do so?

However, as citizens are not legal experts who follow the advances in case-law, it is necessary to discover whether they are drawing the legal line properly, because if they give legal norms and principles a different meaning from the one judges give them, and thus favour illegal actions, the gap is not that wide. In such cases, there will be objectively a gap, but not subjectively, because people will still be believing that they are merely applying state law. A subjective gap presupposes that people, in their approval and willingness, knowingly differ from state law by grounding their views on their own system of norms. Therefore, I will analyse my interviews to answer the following two questions:

1. Are citizens approving of and willing to carry out forms of citizen law enforcement held unlawful by the courts?

2. If they are, are they then aware of the fact that they are approving of and willing to carry out unlawful acts?

In conclusion, we will then measure the gap, knowing to what extent people approve of, and are willing carry out, unlawful *eigenrichting*, and map it in terms of their awareness of the illegal character of the acts that they are willing to do or approve of.

Approval beyond the law

An expression of approval is a general statement that an act is right, by which respondents are saying that they accept that act. A general statement that an act is right means that they accept the act for unknown third parties and not that they accept it for themselves.[59] Approving acts beyond the law means accepting the reaction depicted in the vignette as satisfactory, despite the law disapproving of that reaction.

Approval is expressed in different forms: as a statement that an act is correct, or that an actor cannot be blamed. Sometimes, determining whether narratives were expressing approval was not that easy. Some people approve simply by providing grounds in favour of a described reaction, without approving of it in direct and plain words. This form of approval is, however, not that problematic when narratives put forward consistent grounds. It becomes difficult when they use contradictory grounds, condemning and approving of a reaction. In other occasions, narratives avoid judging altogether, or make it difficult to discern whether the respondent was forming a judgement in a general sense, or for him or herself (willingness). To solve this problem, I asked respondents to tell me what they would do if they were judges in the case. This question was intended to elicit a 'personal judgment', so I explained that they were not being asked to describe what an 'actual judge' would say, but what the respondent would judge from that position. When explaining these questions, I emphasized my intended meaning by accenting the appropriate words, for instance by saying: 'what would you do if you were a judge?' or: 'is that what you would say as a judge?' Later, I would check for the consistency of answers by re-asking and paraphrasing. Of the 144 narratives collected through interviews, 47 approved of actions beyond the law (see Table 2). Of them, 37 used clear expressions of approval such as '*I think it is right*', while ten approved by putting forward grounds in favour of an act, without uttering a clear expression of approval.

The vignette of the handbag snatching garnered the greatest number of approvals: seventeen narratives do not reproach the woman for the death of the young man. Eleven narratives do so in respect of the jeweller who shot a man who was attempting a robbery in his jewellery shop, and nine approved of the owner of the supermarket hitting a man he had arrested. There were approvals for the vignette of the bus; though these were not of actions beyond the law, as this vignette was constructed from a case where the HR also approved of the reaction.

[59] This second form of acceptance is here termed 'willingness'.

Table 2: Approvals beyond the law

		Disproportionate	Unnecessary	Retaliatory	Pre-emptive	Total
Approvals	Unaware	15	8	4	0	27
	Aware	2	3	5	0	10
	Total	17	11	9	0	37*

* Ten further narratives approved by providing grounds in favour of a described reaction, without approving of it in direct and plain words. These narratives are thus analysed when the grounds are analysed.

As we can see in Table 2, roughly three quarters of the 37 narratives express approval without knowing that they are supporting illegal acts, while approvals while aware of illegality accounts for only a quarter of the total. This relationship between 'aware' and 'unaware' approvals varies among the narratives collected using the different vignettes. The largest number of 'unaware' approvals was collected by the handbag-snatching vignette, which depicts a disproportionate reaction. Here, roughly four fifths of the narratives approved of the reaction while unaware of supporting of an illegal act. In contrast, the vignette of the robbery at the supermarket, depicting a retaliatory strike, garnered the largest number of approvals while 'aware', amounting to roughly three thirds of such approvals.

Respondents were not informed during the interviews about the legal limits applicable to the reaction in question, thus they evaluated them in the light of their own living law. Later, when analysing narratives, I examined if they remained within the law or went beyond it, crossing the limits of proportionality, necessity or immediacy. In the following pages we will see narratives approving of different forms of unlawful citizen law enforcement, first unaware and later aware that those acts are unlawful.

Approving while unaware that the act is beyond the law

Since citizens are not legal experts and the respondents were also not informed of the legal decisions in the cases underlying the vignettes, unawareness here means that the narrative shows a lack of knowledge that the act is illegal. Unawareness is an operationalization of the idea of 'confusion' of De Roos (2000). I understand confusion and unawareness here in the sense of a lack of understanding or ignorance in narratives that cross the legal limits. I do not thus mean confusion[60] in the sense of the state of mind in which a person is bewildered or perplexed by conflicting ideas, because this would have meant that the respondents would have been

[60] According to the New Oxford American Dictionary, confusion has two meanings: 1. lack of understanding, and 2. the state of being bewildered.

unable to express an opinion. It is actually an obliviousness to the illegal character of the acts approved of.

Approval of disproportionate harm

We learned that in state law, citizens will not be punished when they cause proportionate harm when effecting citizen's arrests, self-defence or when acting in response to a state of necessity. Basic to the proportionality ideal is that material goods cannot be defended at the cost of lives.

Using the vignette of the handbag snatching, I studied the extent to which people approve of disproportionate reactions. In the vignette[61] a woman drove backwards in her car after a young man who had just snatched her handbag. She drove over him, killing him, and a court sentenced her. I wanted to know if people approved of this reaction while unaware that the act was beyond the law.

That was dangerous [...but] I don't think she is guilty

Eleven narratives found the woman's reaction dangerous, but felt that she should not be convicted. One narrative puts it as follows:

> *That was dangerous* [...] *trying to solve a wrong by doing something wrong never helps* [...]
>
> What would you do if you were the judge in the case?
>
> *I don't think she is guilty* [...] (5)

The narrative begins by describing the act as *dangerous*, but further compares the reaction to the young bag-snatcher's actions, finding both '*wrong*'. Other narratives also questioned the woman's reaction in itself in similar ways, saying for instance, that driving backwards was '*not clever*' or '*foolish*'. [62] However, like the others, this narrative excuses the woman for the outcome of her reaction. The narrative states that the woman is '*not guilty*', just as other narratives say that '*it was not her fault*'; or from the position of a judge, some say '*I would do nothing with the woman*'.

The narrative expresses approval for an illegal action, because it excuses the woman despite the fact that she was found legally culpable. She was defending material goods, and could thus not destroy a life to defend a handbag. Moreover, she had a guarantor role as a licensed driver, thus state law required her to exert the maximum of caution not to cause harm while driving. In the narrative, however, though we see that the reaction itself is questioned, the narrative shows no awareness that a judge would sentence

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61 For a more detailed description of the case see page 78.

62 We will see in more detail how this ground is articulated at page 119.

on that basis. Legal sanction for the act is not contemplated, despite the respondent being required to think from the position of a judge.

I don't think I'd punish her. Perhaps, community service for driving backwards

Four narratives release the woman of responsibility for the death of the young man, though they find the woman 'partially' responsible:

> […] *it was dangerous* […but] *I wouldn't blame her* […]
>
> And as a judge, what would you say?
>
> *I don't think I'd punish her. Perhaps, community service for driving backwards, but not for the death* (14)

We could question whether this is actually a form of approval at all, because the narrative foresees measures to be taken as a result of the person's reaction, which in the criminal law are actually sanctions imposed after conviction. However, the way the narrative judges the reaction reveals the particularity of this form of approval. Here, the narrative reproaches the act of driving backwards while not blaming the woman for the death of the young man. The act is disapproved of, described as '*dangerous*', but the woman is not held responsible for the results of the same act ('*I wouldn't blame her*'). Thus the woman, for this narrative, cannot be reproached for the death of the young man. Nevertheless, instead of fully releasing the woman of all responsibility, the narrative foresees an alternative: not to convict her for the death, but solely for the act of driving dangerously.

Approving in this way, the narrative divorces the consequences of the act (the death) from the act itself (driving backwards), and in doing so approves of illegal action. According to state law, she was required to act with extreme caution, because of her guarantor position as a driver, and also because she was defending material goods. The judge found her legally liable for the death (a disproportionate harm) because this was a direct consequence of her imprudent act of driving backwards.

Other narratives articulate approval in this way also, foreseeing alternatives such as fines, reprimands, or a driving course. What they all have in common is that although they acknowledge that the act transgressed some kind of limit ('*it is dangerous*'), they show no awareness of the fact that an 'actual' judge would convict the woman.

Approval of unnecessary harm

We know from state law that harming legally protected interests is not illegal in cases of citizen law enforcement if such harm is absolutely necessary. According to the principle, an actor should always choose the

least harmful alternative and will not be convicted if he could not use less harmful means.

I used the vignette of the robbery at the jeweller's shop to find the extent to which people accept unnecessary harm. In this case, for the reasons exposed,[63] I consider that the jeweller exceeded necessity by shooting a man in the back of his shoulder, though the latter was not pointing his gun at anyone. The jeweller left less harmful alternatives unused. With this vignette, I studied whether people approved of this, and if they did it knowing that the legal limit had been crossed.

He did well against the robber

Six narratives approve of the jeweller's reaction, stating that he acted correctly in shooting at the suspect. Narratives articulated approval in different terms. One says:

> *The jeweller reacted well to the robber* […] *he did well* (13)

This narrative approves of the jeweller's reaction in quite plain terms. The same act of shooting is approved of ('*he did well*'). According to state law, however, this approval could be considered beyond the law because the jeweller had less harmful alternatives available that he did not use, but the narrative shows no hint of awareness of the fact that a judge could actually pass sentence for this behaviour.

Without a gun it would have been foolish to act [...] he was defending his shop

Another narrative is just as clear as the last one, though it articulates approval in other terms. It does not state approval in terms such as '*good*' or '*well*', but puts forward consistent arguments in favour of the jeweller's actions:

> *Without a gun it would have been foolish to act, he had no choices* […] *he was defending his shop* (2)

The narrative articulates grounds which leave no doubts that the reaction is approved of. Concretely, this narrative states that the reaction was in self-defence, thus the actor was right to act the way he did. From a legal point of view, however, the jeweller could have been convicted for shooting too soon at the chest without trying a non-lethal shot.

Ask him: did you have to do it?

[63] For a more detailed description of the case see page 71.

One narrative was hard to interpret: a clear statement about the shot was missing. However, when I asked about what the respondent would have done from the position of a judge, I heard:

> *You can't hold him completely liable, but ask him – did you have to do it?* […] (32)

In previous fragments, this same narrative speculated about the whole robbery situation: it was very stressful for everybody taking part. These speculations precede the final account that the jeweller could not be held '*completely liable*' by the judge. A judge could only ask the jeweller if he had had to shoot.

The narrative thus makes an effort to reproach: the jeweller is not '*completely liable*': thus, a judge could expect him to explain whether he really needed to shoot. The narrative appears to understand the limits of necessity, but shows neither disapproval nor awareness that a judge could actually have convicted the jeweller and have done more than just enquire whether the jeweller felt compelled to shoot the man in the chest. Because it was proved that the jeweller was a skilled shot, my analysis indicates that he was required to use his greater skills to attempt a less harmful shot.

Approval of retaliatory harm

We know now, that a person can harm legally protected interests without being criminally liable if that person is reacting to enforce the law, within strict temporal limits: the danger of harm must be either imminent or still subsist at the moment of the reaction. A person reacting too late, strikes in retaliation.

Using the vignette of the robbery at the supermarket, I studied to what extent people approve of retaliatory harm. In that vignette, the owner of a supermarket hit a man in the face, breaking his nose, while the latter was lying on the floor with his hands bound behind his back. Let us now see how narratives approve of the supermarket owner hitting the man, unaware that they do so contrary to the legal limits.

It's a wrong reaction [but] I wouldn't punish him

One narrative articulates approval of the supermarket owner, disapproving of the act but not of the actor:

> *I think it's a wrong reaction* […] *You don't have the right to punch him*
>
> What would you do if you were the judge in the case?
>
> *I wouldn't punish the owner; you can say he did it in self-defence. I wouldn't find him guilty.* […] (14)

Two important things stand out when reading this narrative. First, the narrative clearly disapproves of the supermarket owner's reaction, which is felt to be a '*wrong reaction*'. Second, the narrative does not cast the owner as '*guilty*'.

Though it disapproves of the reaction, the narrative puts forward grounds not to find the man guilty, and the terms the narrative uses reveals a tension.

When a judgement is passed from the personal position of the narrator, the reaction is disapproved of, the supermarket owner did not '*have the right to punch…*'. However, from the position of a judge, the narrative states: '*you can say he did it in self-defence*' and concludes that the man should not be sentenced. In saying so the narrative is not saying that the man 'acted in self-defence' but that a judge '*can say*' that the reaction was in self-defence. In other words, the judge should act 'as though' the man acted in self-defence and drop the case. Far from plainly approving of the reaction, therefore, by expressing itself this way, the narrative manages to resolve the tension between two ideas of 'legality', one uttered from the position of a lay person, the other of a judge.

Surprisingly, however, the narrative does not reveal awareness that a proper judge would in fact sentence the supermarket owner. The narrative seems to play with the different interpretations the acts and norms could receive. A judge could interpret the act as fulfilling the requirements of self-defence.

I wouldn't convict him […] I would send him to a therapist

Three narratives disapprove of the owner of the supermarket, but look for alternatives to a conviction. One of those narratives states:

> *I would still find it exaggerated. You caught him, what more do you want?* […]
>
> What if you look at it as a judge?
>
> […] *you get angry. That is acceptable. I wouldn't convict him* […] *I would send him to a therapist so that he can learn to express his emotions without fighting* (28)

This narrative disapproves of the action of the supermarket owner for being 'excessive'. When the narrative says '*You caught him*', it clearly points to a temporal limit. Force can be used as long as danger is imminent or subsists, and not later: once '*you caught him*' you are going too far if you continue hitting, then '*what more do you want*'? However, the narrative argues against a conviction for the supermarket owner.

As a judge, the narrative considers the reasons why the supermarket owner acted the way he did, finding the fact that he was angry '*acceptable*'. The supermarket owner should not be convicted, but needed to learn how to deal with his emotions ('*I would send him to a therapist*'). We thus see that even though emotions make the reaction understandable, there is still something wrong that cannot be simply accepted. The narrative looks for solutions, which, turning away from sentencing the actor, target the way he deals with emotions. The man should not be punished, but be taught how to deal with his emotions, and the solution proposed is a therapeutic measure.

The narrative goes beyond the law because according to state law, emotions did not matter much in this case. The supermarket owner started a new incident by battering a defenceless man. However, the narrative shows no awareness that a judge would sentence the man in the case.

Approving while aware that the act goes beyond the law

Citizens do not always have the legal expertise to know whether an act would be condemned by a judge, but they might have the impression that it could be so. Approving of actions while aware that they are beyond the law thus means here that the respondent either knows or believes that the act is illegal.

Approval of disproportionate harm

Disproportionate harm is approved of when the respondent supports an act that causes an excessively greater harm than the harm threatened by the aggression. Here we see narratives approving of such acts while aware of their illegal nature, collected using the vignette of the handbag snatching.

The victim was punished, and I find it absolutely unfair

Two narratives approve of the woman's reaction, opposing a conviction. One of them stated:

> *The boy died, bad luck for him… But I feel admiration for the woman.*
>
> How far do you think she is responsible for the death of the young man?
>
> *I don't hold her responsible for it* […] *this really happened: the man was run over and the victim was punished, and I find it absolutely unfair* (36)

This narrative approves of the woman's reaction, blaming '*bad luck'* for the death of the young man. In doing so, the narrative excuses the woman for the outcome of her acts and fails to disapprove of the way she acted, because neither the act nor the outcome is regretted. The boy had '*bad luck*'.

Moreover, the narrative speaks of '*admiration*', which expresses 'warm approval'[64] for the woman.

According to state law, nevertheless, the woman was at fault because she created unacceptable risks in driving the way she did to rescue material goods. However, this sentencing decision is felt to be '*absolutely unfair*'[65] by this narrative. The woman was '*the victim*' and it is *unfair* to blame the victim. In these terms, the narrative not only shows awareness of the fact that a judge would convict the woman, but also opposes such a decision by considering a sentence '*unfair*'. A conviction does not conform to the standards accepted by this narrator.

Approval for unnecessary harm

Approving of unnecessary harm means supporting harm that could be avoided using less harmful means. Confronted by the vignette of the robbery at the jewellery shop, some respondents approved of citizen law enforcement while aware that the actions crossed limits of necessity, such as the following.

He will be convicted. But I would say: You did good man!

Three narratives approve of the jeweller shooting, assuming that a judge would pass sentence. One narrative for instance, states:

> *I think that what he did was good; to shoot him down* [...] *he will be convicted. But I wouldn't let my things get stolen!*
>
> What would you say if you were the judge in the case?
>
> [...] *You did good man, I would say* (25)

The narrative approves of the jeweller's reaction, assuming that a judge would condemn the act. Aware of this, the narrative resists every legal reproach, offering grounds for the jeweller to shoot. First, taking the position of the jeweller, this narrator also claims to be willing to shoot ('*I wouldn't let my things get stolen!*'). Second, taking the position of a judge, the narrative congratulates the jeweller for shooting ('*You did good man, I would say*').

The narrative thus approves of an act beyond the law, since according to my legal analysis, the jeweller shot at a time when this was not yet necessary. However, the limit of necessity is resisted. Despite the awareness that a judge would pass sentence, the narrative opposes arguments about the legal

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64 The New Oxford American Dictionary.

65 The interviewee here was convinced that the woman in the case had already been sentenced at the time of the interview, although the sentence was published almost a year later.

limits. From the position of a jeweller, the narrative underlines a sort of 'right' to shoot, stating '*I wouldn't let my things get stolen!*'; and from the more public position of a judge, the narrative congratulates the jeweller.

In addition to approving of an act beyond the law knowingly, the narrative resists the limits of necessity, arguing for other standards than state law.

Approval of retaliatory harm

Narratives approve of retaliatory harm when they find it acceptable that a person should use force and cause harm after the danger acted against ceases to be imminent or present, thus initiating a fresh aggression. I collected the following narratives that approve of such actions while aware they were beyond the law, using the vignette of the robbery at the supermarket.

I would also have done it. But a judge, who looks in the books, he will find it wrong.

Five further narratives approve of the reaction of the supermarket owner, explicitly distancing themselves from a judge by stating:

> *I can well imagine that the owner was so angry that he hit him in the face* […]
>
> What would <u>you</u> say as a judge in the case?
>
> *It is completely different outside the courtroom. As his neighbour, you can say: you are right, I would also have done it. But a judge, who has to look in the books, he will find it wrong.*
>
> Do you think a judge should disapprove of it?
>
> *Yes, before the court. Why did Prince Bernard pay the fine in place of those guys* […]*? Prince Bernard said: I will pay because you were really within your rights* […]. *I think the guys should have never been convicted.* (34)

This narrative is not very consistent in giving a judgment; in fact, two ideas compete with each other. One of those ideas comes from the world of 'a neighbour', the other from the world of 'a judge'. In the world of the neighbour, anger has primacy, thus one expresses sympathy and understanding for the supermarket owner. In the world of the judge, however, '*the books*' rule, thus one reproves of the supermarket owner's deeds.

The narrative places both ideas in different local contexts (the neighbourhood and the courtroom). The question is what is this narrative trying to tell us with this? Does it mean that before the public in a courtroom, the act must be disapproved of and in 'private' approved of?

In the last fragment, the narrative mentions Prince Bernard, who in the case of the Albert Hein manager, personally released the supermarket owner by paying the fine imposed by the judge himself. In that case, the judges applied the books, but the Prince provided an escape by assuming the cost. Symbolically, this act solves the tension between ideas in the narrative.

The neighbourhood and the courtroom thus represent a problem of 'general' versus 'particular' rather than a problem of 'public' versus 'private'. State law speaks of the general standards that should disapprove of the act; but a neighbour, who considers the particular man's anger, approves and also applauds when the Prince offers an escape from court's censure.

The narrative approves of an act beyond the law aware of the fact that the act would be sentenced by state law, and also shows resistance to the legal limits. This is revealed through the 'particular' escape provided by the Prince, which corrects the general condemnation with particular and extra-legal forgiveness.

Willingness to act beyond the law

Willingness is the utterance of personal preference for a certain course of action, expressed by a respondent as if he or she were personally involved in the situation in the vignette. An expression of willingness to act beyond the law is hence a speculation about one's own actions[66] in a given situation, where the law disapproves of those actions.

I collected these statements at the initial stages of the interviews, when I asked respondents to speculate on what they would do if they were in the position of the actor in the vignette. Interviewees were not informed about whether reactions would be lawful or not. They applied limits to their reactions on their own, or they did not.

Analysing the interviews, I first discovered that expressions of willingness are articulated in different ways, and that sometimes it is difficult to assert what they mean. Less problematic are narratives using the pronoun '*I*' to utter personal preferences, but other narratives are more puzzling. Some for instance, say what the respondent 'would like to do', or speculate about what the actor in the vignette would do, without uttering personal preferences for a reaction. In these cases, I kept on questioning until I heard what the respondent would 'personally' do in such a situation. I then discovered that in speculating, respondents often express their motives for doing something,[67] and that they imagine new elements for the vignette to advance their own reactions.

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[66] An expression of willingness articulates a preference; however, we cannot assume this is what the respondent would actually do, if he or she was in the given situation.

[67] I will analyse the expressions of motives from page 135.

Deciding whether an expression of willingness went beyond the law was also sometimes complicated, since the punishability of crimes depends greatly on the outcome of an act, and when narratives depicted acts, it was hard to tell if the preferred reaction would actually go beyond law, for its results did not occur in reality. This happened for instance, with a narrative stating: '*I would run into the scooter to stop it*'. A judge, in such a case, would look at the act itself but also at the harm caused, and considering both, would decide. Before an expression of willingness like that, I assumed that if the preferred reaction was similar to the actual reaction in the actual case (which the vignette emulated), the outcome could be assimilated. Hence, the court decision in the actual case marked the legal limit for the preferred reaction in the narrative. For speculations about acts that could not be assimilated to the reaction in the actual case, I had to consider their possible outcomes, to state how far they went beyond the law.

Of the 144 narratives collected, only eleven state a willingness to act beyond the law. The vignette of the handbag snatching elicited more than half of these narratives, i.e. six narratives expressed a willingness to use the car to stop the thief from escaping. Two narratives express a willingness to shoot the man in the jewellery shop on the spot; two further narratives stated a willingness to batter the man who tried to steal from the supermarket, and one to punch the man before he began an attack in the bus.

As we can see in Table 3, only one of the eleven narratives expressing willingness, do so while aware that they were supporting illegal acts.

Table 3: Expressions of willingness to act beyond the law

		Disproportionate	Unnecessary	Retaliatory	Pre-emptive	Total
Willingness	Unaware	6	2	1	1	10
	Aware	0	0	1	0	1
	Total	6	2	2	1	11

The analysis of the narratives had two purposes. First, to discover if people are willing to act beyond the law; and second, to understand whether they are willing to do so while aware of the fact that they prefer reactions that go beyond the law. This first demanded understanding the sorts of actions respondents claimed to be willing to undertake, to contrast them with the legal limits marked in the legal research. Second, it required finding in narratives traces of awareness of the fact that a judge would punish the preferred act.

In the following pages we will look at some narratives, grouping them according to the extent that they show awareness that the actions preferred go beyond the law, and the forms they use to express this willingness.

Willing while unaware that the act goes beyond the law

Expressing willingness while aware of the fact that the act goes beyond the law means stating a preference for an act, while knowing or believing that state law would condemn such an act. I speak of knowing or believing because since citizens are not legal experts, they can either have proper knowledge or express their perception that an act is illegal.

Willingness to do disproportionate harm

A person who harms legally protected interests in enforcing the law, does not commit a crime if the harm is strictly proportionate, which basically means that a life cannot be the price for defending material goods.

To see how far people obey this legal principle in their preferences for reactions, I used the vignette of the handbag snatching. This described the moment when[68] a woman, sitting in her car, sees a man opening her passenger door to take her handbag, then jumping onto a scooter and rushing in direction contrary to oncoming traffic. Respondents were then asked to explain what they would do if they were in the position of that woman.

The woman in the actual case was convicted because she took unacceptable risks and caused excessive harm by driving backwards until she ran into the suspect, killing him. We will now see the disproportionate acts people stated they would be willing to do, while unaware that they were preferring reactions going beyond the legal limits.

I would run into the scooter to stop it

Five narratives expressed a willingness to ram the scooter. One of them says:

> *I would immediately go after them; I am in my car.*
>
> You are on a one-way street…
>
> *I wouldn't care about that* […] *I would run into the scooter to stop it.* (36)

This narrative expresses a willingness to drive after the scooter, ignoring the prohibition against driving contrary to the direction of traffic. The answer '*I wouldn't care*' evidences the feeling of not being constrained by that rule. Although we do not know what the consequences of this

[68] For a more detailed description of the case see page 78.

hypothetical reaction would be, ignoring the prohibition and intending to run into the scooter could produce the same outcome the actual reaction of the woman in the case produced.

This narrative thus expresses a willingness to act beyond the law because it speculates about initiating a reaction that would cause excessive risk and harm, and as in the case of the handbag snatching, was reproached by the court.

The narrative, however, shows no awareness that a judge would disapprove of the act. The respondent seems neither to consider the risks nor the legal limits, thinking that driving after the scooter and running into it is a suitable alternative.

Run him over […] it's wrong [but] you would try it

One narrative expresses a willingness to chase and run into the scooter while knowing it would be wrong:

> *I would drive backwards to see if I could catch them* […]
>
> How would you do it?
>
> […] *with the same car, run him over* […] *I think it's wrong, but you react like that* […] *it is dangerous, but you can drive your car backwards, and you would try it.* (31)

This narrative also expresses a willingness to run into the scooter and to use the car as a means to '*catch them*', which would also cause excessive risks. It is different from the previous narrative, nonetheless, when it says: '*I think it's wrong* […] *it is dangerous*': we see that risks do come into consideration, but they are deliberately ignored ('*it's dangerous* […] *but you would try it*'). Thus, the same act is perceived as crossing a certain line ('*it's wrong*'), but the narrator would make the attempt while hoping not to cause excessive harm.

Given that this reaction caused the same outcome that the woman's reaction in the case did, a judge could take the intention and reflections expressed in this vignette as an intention to bring those unacceptable risks into being. The criminal law recognises different forms of intention, and intending to stop a scooter by running into it with a car while aware of the risks, could be interpreted either as an indirect intention to kill (*dolus eventualis*) or as a seriously reckless act.

The narrative denotes, as we can see, that willingness to initiate actions while being acquainted with the risks, does not necessarily mean an 'awareness' of going beyond the law. This narrative shows no consciousness that the act would be condemned by a judge. At the moment of thinking how

to act, one is aware of the risks, but 'makes the attempt' believing that harm will not occur.

Willingness to cause unnecessary harm

According to state law, citizens will not be punished when enforcing the law if the harm they cause to legally protected interests was absolutely necessary. If the actor had less harmful alternatives to hand that he did not use, he can be convicted.

I studied how far people are willing to follow this principle by using the case of the robbery at the jewellery shop as a vignette. I described there the jeweller at the moment that he entered his shop while armed and saw the two men attempting a robbery, both with their backs him, one holding a gun pointing at the ground. At this point, respondents were asked to state what they would do.

From my case study I concluded that the jeweller went beyond the law when he shot at the second suspect. I wanted to know if people were also willing to cross the limit of necessity. The following are narratives unaware that the legal limit would be crossed.

I would shoot them down on the spot

Two narratives expressed a willingness to shoot immediately at the man holding a gun pointing at the floor. One of them, for instance, says:

> *I would shoot them down on the spot, without any doubt.*
>
> In which direction would you shoot?
>
> *It doesn't make much difference* [to the one with the gun], *maybe in the chest or a bit lower.*
>
> And the other thief?
>
> *I'd shoot him too, in the legs; so that he also gets punished if the other one dies.* (10)

The narrative expresses a willingness to shoot at one of the men on the spot in the chest, and also at the other one. No consideration of the necessity of these acts is made nor of the possibility of choosing alternatives to shooting. However, it is clear that the intention for the second shot is not to stop the suspects but to punish them ('*I'd shoot him too… so that he also gets punished*').

The willingness expressed in this narratives is similar to the actions of the jeweller in the actual case, which according to my legal analysis were not 'absolutely necessary', but excessively drastic. Though this narrative speaks of shooting the man in the chest or a bit lower, which might not necessarily

cause the death of the assailant, the narrative clearly considers the possibility that the first man would die, and it also seems to accept it ('*so that he also gets punished if the other one dies*').

This willingness to act does indeed go beyond the law, although it does not reveal that the narrative is aware of the fact that a judge could condemn such an act.

Willingness to cause retaliatory harm

Temporal criteria also mark the limits for citizen law enforcement. The principle of immediacy states that a person may harm legally protected interests, without being criminally liable, if he or she reacts against an imminent and unlawful danger. A person who reacts after the aggression has stopped or the arrested person is defenceless, causes harm in retaliation.

My intention in using the vignette of the robbery at the supermarket was to learn about people's willingness to cause retaliatory harm, but this yielded no narrative. Surprisingly, nonetheless, the vignette of the fight in the bus elicited an expression of willingness to commit retaliatory acts, while unaware of their illegal character. When the respondent was put in the position of a man being threatened in a bus and seeing the others approaching him, I heard the following narrative.

If he says something about my mother, then I would hit him

One narrative expresses willingness to strike the man in the bus, stating:

> *It depends on what he says, but if he says something about my mother, then I would hit him on the spot*. (10)

This narrative speculates about punching the man, if the latter '*says something*' about his mother. In doing so, the narrative adds a new element to the context provided, and imagines what to do in that case. The narrator imagines that the assailant insulted his or her mother's honour, to which the reaction would be to '*hit him on the spot*'.

This willingness goes beyond the law because citizens have the right to self-defence against imminent aggressions, but not against fulfilled aggressions. Once an insult has been uttered, honour is already injured, thus any reaction is retaliatory.

However, let us continue to analyse this narrative legally. Let us say the respondent imagined his mother would be further insulted in the bus, and he thus preferred to stop the man from continuing to doing so by punching him. We can then say that in state law, insults or verbal aggressions, though unlawful, are not the kind of imminent aggressions against which someone is justified to use physical force and cause harm to stop. We saw in the legal

study that the law justifies harm in self-defence to preserve certain legally protected interests: the body, decency or material goods, which have a material existence. However, honour is excluded, and that is what the legislator wanted. The narrative thus expresses a willingness to act beyond the law by expressing willingness to react in defence of an interest which is not recognized as defendable through self-defence. Honour can only be defended before a court. However, this narrative gives no hint of awareness that the said preferred reaction would cross legal limits.

Willingness to strike pre-emptively

We saw that temporal criteria set limits to retaliation but also to pre-emptive strikes. This second limit states that reactions cannot begin before the aggression is imminent, when harm is about to begin. Citizen law enforcement can be reactive, but never pro-active when using force.

The vignette of the fight in the bus helped me to study people's willingness to act beyond the law, striking pre-emptively, and the extent to which they would do it while aware that it is unlawful. The vignette depicts an incident where a man, threatened by a couple of young men in a bus, sees them coming towards him, and one of them bumps his chest onto him. At that point, I asked respondents to describe what they would do.

The man in the case hit the young man in the face and the judge found that he acted in self-defence. The judge considered that the man could not escape from an imminent act of aggression. The act of the man in the case was lawful, but with the vignette I collected one narrative speculating about an action while unaware that this would go beyond the law.

I would shove him away and then knock him down

One narrative expressed a willingness to hit the young man, saying:

> *I would just knock him down* […] *I would shove him away and then knock him down.* (10)

Paying attention to the sequence of movements described by this narrative, we see it speaks of two movements: first, of shoving the threatening man away; and second, of knocking him down. After bumping chests, the narrative foresees moving away from the man, and then going after him, to knock him down. Gaining distance is the first reaction, but the narrative shows a further willingness: '*then knock him down'.*

We saw in the legal study that the judge considered the reaction of the man legal, because he struck out after the younger one bumped into him. The older man – the judge considered – had no way to escape. The bumping of chests meant an imminent threatening danger, which legally enabled the man to defend himself.

My narrative, however, creates a new situation. It expresses a willingness to strike after having gained distance from the aggressor. However, from the moment a person gains distance from an aggressor, the aggression becomes less 'imminent' and as long as the former aggressor does not reattempt an attack, hitting would not be an act of defence but a fresh aggression (Noyon, Langemeijer, et al. 2003: Art. 41-13). In the new situation imagined by this narrative, knocking the young man down could therefore not be regarded as acting in self-defence, but is rather a fresh attack at a point when the aggression is no longer imminent, or before it becomes imminent again.

The narrative thus shows a willingness to use physical force beyond the law, as it is willing to make a pre-emptive strike, though it shows no awareness of the fact that a legal limit would be crossed.

Willing to act while aware that the act goes beyond the law

Citizens also referred to the legal limits in their narratives. Even though they might not have legal expertise, they could be convinced or believe that an act would be condemned by a judge or in general by state law. Expressing a willingness to act with that conviction or belief means to me that they are 'aware', because I was analysing narratives expressing willingness to commit acts, which had already been condemned by the courts.

Willingness to commit retaliatory harm

The vignette of the robbery at the supermarket is the one I purposely used to discover if people are willing to commit retaliatory acts. There, I described the owner of the supermarket running after the man who had just robbed his shop. He catches the man, and helped by his assistant, ties the assailant's hands and holds him down on the ground. Putting respondents in this situation, I asked them to state what they would do. I wanted to know if they were also willing to hit the man after he was defenceless, and if they were, I wanted to know if they knew that the legal limit would be crossed. One narrative expressed a willingness to cross this line, while aware of it.

I'd beat him up, but not too hard, because then you'd have the police after you

Of all narratives collected, only one expressed a willingness to do the same as supermarket owner did, while aware that the act would go beyond the law:

> *I'd beat him up, but you cannot hit him too hard because then you'd have the police after you. I would hit him with the flat of my hand for what he did* […] *Then I would take him back to the shop, lock the door and tie him to a chair. Then I would wait for the police.* (10)

The narrative shows a willingness to hit the man after he had been arrested, and the intention is clearly not to defend interests at risk or make an arrest, but to punish him '*for what he did*'.

Moreover, the awareness of crossing legal limits is visible. The narrative emphasises how to batter the man without being noticed by the police ('*with the flat of my hand*'), knowing that otherwise '*you'd have the police after you*'. On this path, this narrative evidences not only a willingness to cause harm in retaliation while aware of acting beyond the law, but also subverts police authority. The narrative explains us the steps to be taken to hide those acts from the police.

However, the narrative expresses a willingness to go further, committing an act which could also go beyond the law. Moving the arrested man into the shop, tying him up and locking the door to '*wait for the police*' could be found to be excessively harsh. In principle, restrictions to physical freedom must be absolutely necessary not to be reproachable. This means that the restriction to freedom must be the least necessary to deliver the arrested person promptly to the police. In this sense, one may lock a person up if this is necessary to impede his escape, provided that it would be unsafe to keep the arrested person at the spot where he was arrested. Parallel to this, one may tie someone up inside a locked room, if the person behaved in such a way as to threaten danger to others or to himself. However, the narrative does not make any evaluation of the circumstances that would justify both locking and tying someone to fulfil the act of promptly delivering the suspect to the police. Both conditions are important.

De Hullu (2012:372) gives primacy to the principle that the act of locking someone up must be proportionate to the goal of delivering the person to the police. Keulen and Knigge (2010:314) argue in addition, that the intention of delivering the person promptly to the police for interrogation must be evident in the form of detention. The HR clarified this in 1987,[69] for instance, when it confirmed the decision of a lower court to convict a man for unlawful deprivation of freedom. The man caught a young man, who entered his backyard without permission. He carried the young man into his shed and locked him up for some time, refusing to set him free when his mother came to pick him up. The HR confirmed the conviction, finding that the man obviously did not have the intention to deliver the young man 'promptly' to the police.

Therefore, the act of moving the man to lock him up in a room, and once locked up, to tie him to a chair, could appear to a judge as an act beyond the limits of the law, as unnecessary and retaliatory.

This narrative, in conclusion, expresses a willingness to cause harm beyond law, in hitting and restricting a person's freedom in retaliation. It also shows awareness that such acts would be legally reproached, but displays a subversive attitude in looking for a way to defy legal reproach by hiding the actions from the police.

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69 HR 23 June 1987, NJ 1988, 324.

Conclusions

In this chapter I mapped the social space for citizen law enforcement. My hypothesis was that people would approve of and be willing to commit unlawful citizen law enforcement or *eigenrichting*, while unaware that the actions they approve of or are willing to take, go beyond the law. The hypothesis would be refuted if respondents expressed willingness and approval while aware of the fact that legal censure would follow the act presented in the vignette. The hypothesis would be confirmed if respondents approved of and were willing to commit unlawful acts while unaware that a judge would condemn the acts preferred. On the basis of my empirical research, the hypothesis is supported. The analysis of the narratives collected through interviews shows that by far the majority express approval and/or willingness to commit the acts presented by the vignettes while being unaware of their illegal character. Relatively few, i.e. roughly a quarter, expressed approval for actions going beyond the law while being fully aware of their illegal character. Only in exceptional cases, just one out of eleven, did a narrative express a willingness to commit illegal *eigenrichting*. In other words, most of those who knowingly approve of an illegal course of action, do not express any willingness to undertake the actions they approved of themselves. Only the vignette of the handbag snatching elicited a number of narratives expressing both approval and willingness to act in the same illegal way that the woman in the car did.

Narratives approving action beyond the law while unaware of the legal limits were collected with three of the vignettes presented. There are also approvals in the vignette of the fight in the bus, but they do not count, because the HR also approved of the man's reaction: thus, the approval from respondents was not of an unlawful act.

Approvals can be grouped in three forms of approval. A first form approves while unaware that a judge would convict the defendant, further finding the reaction right in itself ('*he acted well against the robber*'). This form of approval shows acceptance of the reaction itself, considering that the person in question had the right to act the way he did, giving no hint that the narrator was aware that a judge could condemn the reaction. This form was collected with the vignette of the robbery at the jewellery shop, where unnecessary harm was caused.

Another form of approval was collected with the vignettes of the robbery at the jewellery shop, the handbag snatching and the robbery at the supermarket. Distinct from the former, approvals here question the reaction itself, presenting two variants: they either excused the actor or proposed alternatives to sanctions. The first variant excuses the actor by stating for instance: '*It's a wrong reaction,* [but] *I wouldn't punish him*'. These narratives make evident the perception that the wrongfulness of the reaction is a feature of the act itself, but a person acting in that way cannot be blamed. We encountered this variant in the reaction of the woman in the handbag

snatching case (disproportionate reaction), and in the supermarket owner (retaliatory harm). The other variant of this form of approval disapproves of the reaction itself, but rather excuses the actor by searching for alternatives to a conviction, such as: '*I wouldn't convict him … I would send him to a therapist*'. This form of approval foresees for instance, a '*work-penalty*', a reprimand or sending the actor to '*a therapist*', but not as a sentence, as these measures are not seen as connected to the condemnation a conviction would imply. This variant was collected with the vignettes of the robbery at the jewellery shop, the handbag snatching, and the robbery at the supermarket, approving of disproportionate, unnecessarily drastic and retaliatory harm, though they show no awareness that a judge would convict the actor.

A final form of approval, applied in favour of a retaliatory act, played with the space judges have for interpreting the law, stating that a judge could 'act as if' the given reaction was justified ('*you can say he did it in self-defence*'), though the narrative showed no consciousness that the act was indeed illegal.

Narratives expressing willingness to commit unlawful acts while unaware of their unlawfulness (10 in total) were collected from all four vignettes. Even though the four vignettes did not all illustrate unlawful acts, some narratives expressed a willingness to commit unlawful acts by adding new aspects, thus creating new situations out of the presented vignettes. These narratives can be grouped into two forms of expressions of willingness.

The first form of expression of willingness expresses a disposition to commit acts such as to '*bump into the scooter*', '*shoot*' or '*knock*' down the suspect, departing from the idea that the actor would have been within his or her rights by acting in that way, and further giving no hint of awareness that a judge would condemn the acts. They leave prescriptions requiring proportion or necessity, or forbidding retaliatory and pre-emptive strikes completely out of the picture, stating that they would just do it.

A second form was collected with the vignette of the handbag snatching. Here, a narrative expresses a willingness to drive and run into the scooter, despite the act being '*dangerous*'. This form makes evident the perception that the act could produce unwanted and unfortunate results, but expresses a willingness to act while showing no awareness that a judge in fact would condemn the act. The narrator just hopes to avoid major damage when acting in that way ('*it's dangerous, but you'd make a try*').

Of the narratives approving and expressing willingness to act while aware of the fact that a judge would sentence the acts (11), only one narrative expresses willingness (1); the overwhelming majority of the narratives merely approve (10). These narratives were collected with three of the vignettes presented (the handbag snatching, the robbery at the jewellery shop and the robbery at the supermarket).

Of those approving while aware, the majority approve of actions and clearly resisted a sentencing decision, through different forms of approval.

One form states that a sentence would be '*unfair*'. This form applies to the vignette of the handbag snatching, stating that sentencing the woman for causing disproportionate harm was unfair.

Another form resists a legal conviction by expressing admiration for the actor (*You did good man!)*. In doing so, the approval supports the jeweller shooting on the spot, which could cause unnecessary harm, in the vignette of the robbery at the jewellery shop.

The third form resists the legal decision and praises Prince Bernhard for paying the fine for the convicted supermarket manager in the Albert Hein case.

Only one narrative expresses a willingness to act while aware of doing so beyond the legal limits, and this was collected with the vignette of the robbery at the supermarket. This narrative expresses a preference for hitting a suspect who had already been arrested, but '*not too hard, because then you'd have the police after you*'. The narrative plans how to avoid a probable legal prosecution, by foreseeing hitting in a way that would not produce visible injuries.

Finally, let us look at these findings in perspective and draw some conclusions.

Taken together, the analysis of the narratives shows that a gap exists between state law and the legal consciousness of people in cases of citizen's arrest. Some narratives do indeed allow a wider space for citizens to practice citizen's arrests than the space offered by state law. Good examples of this are narratives stating that the supermarket owner was 'right' in hitting a man (the suspect) who lay defenceless on the floor. However, we also found narratives assessing the same act as 'wrong', but arguing that the supermarket owner 'should not be convicted'.

Donald Black (1983) postulates that people accepting *eigenrichting* are convinced of 'being in the right', but my findings add nuance to this idea. Here I show the wide spectrum of forms of acceptance, where approvals and expressions of willingness can range from weak forms – where the act in itself is disapproved of but the actor excused – to a strong form – where the narrative also expresses willingness to take the law into one's own hands. In between, there appears to be a multiplicity of forms of acceptance, such as those that explain that the act was plain and simply 'right', or those others that speculate with action despite the act being 'dangerous'. In conclusion, Black's idea of the person supporting *eigenrichting* out of the conviction of 'being in the right' is only a part of the empirical reality; people can also find the act to be 'wrong', dangerous or even foolish, but still excuse the actor.

People's approval of certain acts of *eigenrichting* may imply anything from giving consent to other people's actions – with or without reservations – to expressing a personal willingness to act. However, it cannot simply be inferred that people are willing to act in the very same way that they approve of when others are concerned. We should keep this in mind when we now return to the first research question, i.e. do people who approve of the acts of others also express willingness to commit *eigenrichting?*

By analysing the narratives, I found that most of those expressing approval of an illegal course of action do not express any willingness to undertake the actions approved of. From this finding we can conclude that approval for the acts of others is not generally coupled with a willingness to act in the same way. Acceptance can, therefore, best be regarded as an act of tolerance. Returning to Black's theory, this finding suggests that his theory was either too general or too limited. If the theory sought to explain *eigenrichting* both in the form of approval and in a willingness to act, it remained too general, failing to distinguish the intrinsic difference between both and failing to suggest explanations for the fact that people might approve without being willing to effect *eigenrichting*. On the other hand, Black does not explain if his study concentrated on willingness or approval, but looking at the examples of *eigenrichting* the theory gives, one could conclude that it referred to the 'willingness' to effect *eigenrichting*. If this is the case, the theory was limited to considering how the 'approval for' and not only the 'willingness' to effect *eigenrichting* provides for 'social control'.

In answer to my research's second question, i.e. whether people accept an act while unaware that it is a form of illegal *eigenrichting*, I found that only a few narratives actually approved and expressed willingness while being fully aware of the illegality of the course of action. Most narratives show no hint of knowingly approving that other people should cross the legal limits, nor expressed a willingness to do so personally. From this finding we can conclude that my hypothesis about the confusion is largely confirmed: people mainly approve of or express a willingness to commit *eigenrichting* while oblivious of the fact that they are supporting illegal acts. Approval while being aware of the illegality of the approved act is infrequent and willingness while aware is clearly exceptional.

Although we know now that approval for illegal acts is infrequently coupled with awareness of the illegality of the same act, and willingness while aware of this is even more exceptional, we still cannot conclude that people mainly take a hegemonic stance with respect to state law. According to socio-legal theorists, we can only draw conclusions on the hegemoniality or subversiveness of legal consciousness, i.e. we can only know people's normative ideas. Only their normative ideas can tell us if they are upholding or defying legal rules and principles.

Hence, to know if support for *eigenrichting* is subversive or not, we have to look deeper into the respondents' arguments, studying why they put the line

(approving and expressing willingness to act beyond the law) where they put it. To know this we have to study both the arguments of those aware, and the arguments of those unaware of supporting illegal acts. This is the purpose of the following chapter, where I will analyse the arguments people use to approve of and express their willingness to effect *eigenrichting* and determine to what extent their arguments are hegemonic or subversive.

VII. Understanding the gap

Introduction

Now that we have established that there is a gap between the space state law permits for citizens to use force, and the space citizens claim for themselves, the question in this chapter is how this gap opens. How come people end up approving of and expressing a willingness to effect *eigenrichting*? I will answer this question by analysing the grounds and motives respondents give for their support of illegal actions. People are not legal experts and, therefore, do not know with technical certainty if acts they believe to be illegal are indeed illegal according to state law.

My hypothesis is that people who approve and express willingness to act beyond the law while unaware that they accept illegal acts will base their views on hegemonic grounds and motives; and those who approve of and express willingness while knowing that those acts go beyond the law will do so on subversive grounds and motives.

People who accept acts unaware that they are illegal will use hegemonic grounds and motives because they are not wittingly questioning the law in itself, but confusing the limits created by it. They argue that the state centralizes the power to enforce law in society but give the legal prescriptions regulating that power an interpretation which differs from the one judges give them. Conversely, people approving or expressing a willingness to act beyond the law while aware of the illegality of the acts they accept, will do so on subversive grounds and out of subversive motives because they bluntly disagree with the central role of the state enforcing law and sustain principles which are incommensurable with state law.

In analysing grounds and motives I want to determine if support for *eigenrichting* is based on hegemonic or subversive arguments. I must, therefore, analyse all the narratives going beyond the law to reach those arguments, because as people do not really comprehend the content of the law, we have to know the arguments they offer for every instance of support of acts going beyond the law.

Following socio-legal theory, we have to gain access to peoples' normative ideas to reach their legal consciousness. We find them in the grounds people put forward and the motives they express to justify their views or actions,

no matter whether they are aware of approving of acts beyond the law. Subversiveness or hegemoniality thus manifest themselves in normative ideas and not in the limits people ascribe to actions.

Normative ideas are hegemonic when they are oriented by legal standards, but they might also derive from standards alien to state law, in which case they are subversive, as they defy and compete with hegemonic ideas (Ewick and Silbey, 1998). Because the living law does not exist in a vacuum, people's normative ideas change along with changes in society as they develop together within social discourse.

In the following pages I will analyse narratives to get to know the arguments people use to approve of and express willingness for illegal action. I will find those arguments in the grounds and motives people offer to approve of or justify willingness for action beyond the law.

A ground is an argument a person offers to back approval for an action. A motive is an argument a person offers to back willingness to carry out a hypothetical course of action. Analysing the two, I aim to reveal the types of arguments people use, and discover whether arguments are hegemonic or subversive of legal principles. Grounds and motives are hegemonic when they are oriented by legal principles: where they uphold the state as the natural authority allowed to forcefully enforce law in society. They are subversive when they defy those principles.

Looking at four concrete cases dealt with by the courts, we saw how principles and norms were applied in the legal realm. We learned the arguments judges apply to distinguish lawful and unlawful citizen law enforcement. Looking at the grounds and motives people offer, we will be able to contrast arguments and acknowledge whether citizens are oriented by the principles of proportionality, absolute necessity and immediacy, the latter containing both the prohibition of retaliation and pre-emptive strikes.

I will analyse narratives approving of and expressing willingness to act beyond the law to answer the following questions: 1. How do people ground approval and put forward motives for their willingness to effect unlawful citizen law enforcement? 2. Is this approval and willingness based on hegemonic or subversive grounds and motives?

Having analysed the arguments people use to approve of and motivate *eigenrichting,* and having determined whether they are oriented by them (hegemonic) or defy them (subversive), we will be able to understand how *eigenrichting* receives support in society, explaining why the gap between the living law and state law opens, and disregarding how far the gap endangers or does not endanger the rule of law.

Grounding Approval

Grounding is a social act performed in a situation where a respondent approves of a course of action pictured in a vignette and offers arguments in favour of the said course of action. A ground is hence an argument backing approval of an action.[70]

We find grounds in narratives where reasons are given to persuade us of the acceptability of an action.

Grounds can present different structures: they can bring arguments that the act itself was 'right': e.g. when they say someone '*acted well because the situation is very threatening*'. I describe this form of argument as 'justification'. They can also offer arguments urging that the actor should not be blamed, though the act itself is questioned. I define this form as an 'excuse', because it speaks for the actor. Examples are to say '*she acted instinctively*' or to blame third parties or external circumstances for what the actor did, such as saying: '*he came with a gun, he started it*'.

I analysed the arguments expressed in the 47 narratives collected that approve of or express a willingness to act beyond the law. In my analysis I want to discover how people ground approval for unlawful acts, distinguishing whether their arguments are hegemonic or subversive. As we can see below in Table 4, the narratives expressed both kinds of grounds, those conforming and those defying the monopoly of the state over forceful means in society. In the following pages we will analyse those arguments as a first step towards gaining an understanding of the gap.

Table 4: Grounds

		Dispropor-tionate	Unneces-sary	Retalia-tory	Pre-emptive	Total
Grounds	Hegemonic	22	5	1	0	28
	Subversive	11	2	6	0	19
	Total	33	7	7	0	47

Hegemonic Grounds

A ground is hegemonic when it argues for the established distribution of authority over coercive means (Ewick and Silbey, 1998:225): in other words, when it upholds the supremacy of the state in the use of force, restricting its use for citizens only to exceptional circumstances. Operationalizing this idea, grounds are hegemonic when they are oriented

[70] According to the New Oxford American English Dictionary, grounds are factors forming the justification for acts.

by principles of proportionality, absolute necessity and immediacy, and when people give them meanings different from the one judges give.

Now we will discover the hegemonic grounds people offer in favour of actions that contravene principles of proportionality, absolute necessity and immediacy – the latter disregarding the prohibition of retaliation.

The principle of proportionality in the living law

Having studied state law, we know that citizens are not punished for enforcing the law if the harm they cause to protected interests remains proportionate. A degree of disproportion will go unpunished if the actor was affected by strong emotions or an unbearable psychological state, or when harm was caused despite the actor having taken the necessary precautions to avoid it. However, beyond these special circumstances, disproportionate harm is punishable, and a basic idea is that material goods cannot be defended at the cost of lives.

The vignette of the handbag snatching served me as an instrument to explore how far this principle can be found in the living law. There,[71] a woman was sentenced because she caused the death of a young man while trying to recover her handbag. The trial judge found that she was responsible for his death, regardless of whether she intended to kill or not, merely because she caused excessive danger by driving fast and backwards after the scooter.

The following are the hegemonic grounds I collected supporting such an act.

Those are important things that she was losing

Five narratives ground approval by arguing that the woman intended to recover her bag. One of them says:

> […] *she wanted her bag back.* […] *those are important things that she was losing'*
>
> What do you think of the outcome of her reaction?
>
> […] *she <u>just</u> wanted her bag back. That's why she drove after them.* (2)

The narrative grounds approval by considering the woman's intentions: '*she just wanted her bag back*'. Accenting the word '*just*', the narrative emphasizes that she did not want anything else but to recover her bag, neither to kill the young man, nor to cause an accident. Driving fast and backwards after a scooter is regarded as a reasonable and somehow natural reaction because of this intention. '*Just*' thus also means that the act needs

[71] For a more detailed description of the case see page 78.

no further explanation. When I asked about the outcome, the intention was recounted as though it fully justified the reaction.

In addition, when the narrative states '*those are important things that she was losing*', the intention is qualified by reference to the contents of the bag: there were valuable things in there. The ground thus used is that the things were valuable enough to justify driving after the scooter and running into it to recover them.

The ground resembles self-defence, which justifies the use of physical force and the causing of harm to protect material possessions. That justification, however, embraces an idea of proportionality different from the one in this narrative. The things in a bag can never have a greater value than a life. It is this evaluation of proportion that differs from the one judges have.

For a judge, proportionality means that the actor does not produce excessive harm to protect material goods. The actor must exhibit greater prudence in reacting, as material goods cannot be defended at the cost of lives. According to this narrative, conversely, a person protecting '*important*' material goods is justified in also causing harm to the life of a suspect. This is the gap. The gap between the living law and state law opens when citizens have a different idea of proportionality, according material possessions greater value than the life of a suspect.

Though different from state law, the narrative is hegemonic: approval still turns on an idea of proportion. The meaning of this idea is the difference. The narrative stretches the limits of proportionality, extending the space for defending material goods to include risking the life of an aggressor.

It's panic … you act on your instincts

Four narratives argue that the woman cannot be blamed for the death of the young man because she acted on instinct. One narrative puts it as follows:

> *I wouldn't blame her* […] *It was an accident; she just wanted to recover her bag. It's a foolish reaction, but it is understandable. It's panic, and I don't think you can reflect in such a moment, you act on your instincts* (14)

The narrative neither approves of the outcome of events, nor of the reaction itself. The events are defined as an '*accident*', and the reaction is '*foolish*'. Both definitions are key to understanding this ground.

According to the dictionary, '*an accident*'[72] is an unfortunate incident that happens unexpectedly and unintentionally. The narrative thus means, first, that the death of the young man is an unfortunate occurrence, something

[72] The New Oxford American English Dictionary.

that should not have happened. Second, it means that the outcome was not intended by the woman, because her intention was different: to recover the bag. The narrative thus regrets the results, but does not blame the woman for them – she did not intend them. It was foolishness.

A '*foolish*' reaction is, according to the dictionary, an unwise or imprudent[73] act. The narrative mentions that the woman '*wanted to recover her bag*' but, reacting out of '*panic*' and being unable to '*reflect*', she acted on '*instincts*'. The '*foolish reaction*' hence, is excused as she could not be expected to '*reflect*' in such a time, she could not think of the risks her reaction would produce. *Panic* and *instincts* are offered in the ground as conditions disturbing the capacity of the woman to *reflect*. She was incapable of controlling herself, thus one cannot blame her for the accident. She was governed by uncontrollable conditions, thus the death of the young man was not her fault.

The ground, as we can see, regrets the death of the young man and disapproves of the act in itself, but it denies the woman's responsibility for the outcome because she lacked the intention to cause the harm she caused. The narrative, however, gives this lack of intent a meaning that judges do not give.

According to law in the books, the woman was neither permitted to intentionally run into the scooter nor could she drive imprudently. According to the proportionality principle, she could not cause harm to lives to protect material goods. In addition, because she was a licensed driver, she had guarantor role in the traffic (*Garantenstellung*) that heightened the requirement on her to exercise caution. The law obliged her to act like a 'prudent driver', and she did not, driving fast against the direction of traffic.

Nonetheless, the narrative is oriented by criteria valid in the legal sphere. In state law a person can be excused by strong emotions, such as *panic* (improper use of self-defence) or a pressing psychological state (psychological *force majeure*), when the act produces disproportionate harm. Seen in that way, the narrative does not defy the principle of proportionality, but it fails to evaluate liability over unintended results as a judge would. She could hardly allege to a judge that she lost control of the car out of panic, because she was required to exercise greater self-control while driving. That is what the law requires of those in a guarantor position.

The narrative shows that the gap can open when citizens and judges differ in attributing liability over unintended disproportionate harm. While state law establishes objective standards of liability (the 'prudent driver') disregarding the emotions of those in a guarantor position; citizens give pre-eminence to the emotions caused by the aggression to excuse the actor for

[73] The New Oxford American Dictionary explains that a 'fool' is a person who acts unwisely or imprudently.

the disproportionate harm caused. In these terms, *Garantenstellung* appears to have a different relevance to judges than to citizens because to people, emotions have greater relevance than the obligation to act wisely.

The criterion of *Garantenstellung* has moreover dramatically increased in relevance in modern law. Many now signal a tendency in law increasingly to embrace evaluations of 'objective culpability', whereby an actor is found liable for harmful results merely for failing to comply with legal requirements, regardless his intentions. The narrative we studied, however, seems to contradict this trend by excusing imprudent acts during citizen law enforcement.

She had no control over the car

Thirteen narratives excuse the woman by arguing that she had no control over the car, such as the one which stated:

> *I don't think she is guilty. It was an accident. She <u>just</u> wanted to chase after them. She had no control over the car. She didn't do it on purpose* (5)

This narrative, like the one analysed above, does not approve of the act itself but excuses the woman by defining the events as accidental. However, the definition of the 'accident' differs from the one we saw above.

An accident is indeed an unfortunate unintended occurrence: the woman '*didn't do it on purpose*'. Other conditions were in play, which is why the woman is not 'guilty', but these conditions are different from those put forward in the ground analysed above.

The narrative assumes that the woman '*just wanted to chase after them*'. By saying so, the narrative shows approval for the act of chasing after the thieves, but refers too to a mismatch between intentions and results. Her intentions were right but the harm, though not right, was not something intended by her. The narrative explains that she '*had no control over the car*', but here the reaction was not conditioned by panic or instincts, which are internal forces acting within the woman. This narrative asserts that the woman '*had no control*', as though the car was controlled by something else.

Respondents knew from the vignette that after the bag was snatched from the car, the woman hastily drove backwards fifty meters, until she bumped into some traffic bollards, lost control of the car and ended up crashing into the scooter. When this narrative states that she '*had no control over the car*', it thus refers to a car moving 'uncontrolled' after having bumped into the traffic bollards. An external condition intervened in the events, thus the woman cannot be held responsible for the results.

This ground resembles the excuse-defence of absence of all fault or *avas*, which excuses a person who causes harm in the absence of 'minimum fault'. A minimum of fault means failing to exercise all due caution. According to the doctrine, those who exercise all due caution will not to be blamed for any harm caused by the intervention of external causes or circumstances.

This narrative is oriented by this idea: the woman has no fault because external circumstances took control of events. However, the gap with state law opens because the narrative fails to weigh the requirements of caution as a judge would. No matter her intentions in driving after the scooter, from the moment she contravened the traffic rules (driving backwards at high speed and against oncoming traffic), she was not exercising the 'maximum of caution' the law required. Losing control of the car was thus her fault.

The ground is thus oriented by principles valid in the law, such as when excusing the woman and regretting the result of her actions, the narrative upholds the principle that citizens can protect material possessions only proportionately. The ground, nevertheless reveals the gap in citizens failing to appreciate the requirements of precaution the way judges do. The woman was compelled to act as a 'prudent driver' (*Garantenstellung*) and never drive backwards against oncoming traffic. The narrative interprets her actions in much stricter terms than state law, deriving liability from direct intention and disregarding liability for reckless acts.

The principle of absolute necessity in the living law

According to state law, citizens who cause harm while enforcing the law will not be reproached if the harm was absolutely necessary. This is the case if the actor had no other less harmful means available. If he or she could have avoided causing harm altogether, or could have produced a lesser harm but choose a harmful alternative, the act is punishable. Under some special circumstances, nevertheless, unnecessary harm can be excused if the actor acted while under the influence of strong emotions or an unbearable psychological pressure produced by the danger.

Using the vignette of the robbery at the jeweller's shop, I studied to what extent this principle can be found in the grounds people offer to approve of actions considered unnecessary by judges. How are people oriented by this principle? In the case of the robbery,[74] the jeweller exceeded necessity because he shot a man in the back, though the latter was not pointing his gun at anyone. He did not attempt a less harmful shot, even though he was a trained shot.

The following narratives show the grounds people use to approve of unnecessary acts and how those grounds are actually oriented by the same legal principle they contravene.

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[74] For a more detailed description of the case, see page 71.

The situation is very threatening

One narrative approves of the jeweller's reaction by emphasizing the acute character of the situation he was in:

> *One of the thieves had his gun pointing at the ground. He could use that gun at any moment … he could point it at someone. The situation is already threatening. Very threatening* (26)

The narrative underlines the fact that though the suspect has his gun pointing at the ground, the situation was very threatening. Three aspects in the situation are stressed: 1. that the suspect was armed, 2. lives were in danger, and 3. there was no time to think of alternatives. The narrative states '*He could use that gun at any moment*'.

The narrative justifies the jeweller's reaction, articulating an argument that resembles self-defence: it justifies someone causing harm by shooting, when this is necessary to defend lives threatened by a pressing danger. The narrative states that the reaction was absolutely necessary by focussing on the 'threatening' character of the situation, whereby the assertion '[t]*he situation is already threatening*' underlines the fact that despite the thief pointing his gun at the ground, he was capable of using it any instant. The jeweller did not thus actually have the chance to cause a lesser evil; he was compelled to shoot immediately, and at the torso.

This form of reasoning is oriented by the principle of necessity. In law, the principle states that a person should choose the least harmful alternative available; however, the more imminent the danger, the fewer the opportunities to think of alternatives.

The narrative shows, nevertheless that a gap between state law and the living law opens up when people appreciate the pressing character of a situation differently from judges. Judges would consider two other aspects here: 1. the jeweller was a trained shot and 2. he took his suspect by surprise, from behind. Because the jeweller was a trained shot, a judge could require the jeweller to try to cause a lesser harm, such as shooting at a leg or hand. Because the jeweller took the suspect by surprise, he had more time to think of alternatives.

This narrative thus approves of drawing arguments from a principle that the criminal law sustains, but fails to give the same weight to major moderating criteria that judges would. The 'mistake' of the narrative, however, does not seem to be fully misplaced. Many commentators suggest that laws currently appear to leave out moderating requirements when measures are taken to prevent a concrete harm (De Roef, 2003). Today, laws always seem to allow earlier interventions to address dangers, and this narrative appears to be in tune with this trend.

The narrative thus shows that the gap between the living law and state law opens when citizens approve of actions while disregarding extra requirements of moderation, as they overestimate the pressing character of a danger. In doing so, they lower the threshold the law sets for harmful reaction, allowing citizens to act earlier to anticipate concrete harm.

He wants to defend his shop

Two narratives approve of the jeweller's drastic reaction by focusing on his intention to protect his shop. When asked to evaluate the reaction, one narrative states:

> […] *you want to protect your shop* […]
>
> If you were the judge, how would you decide?
>
> […] *he was defending his shop* (21)

This narrative approves of the jeweller's reaction by arguing '*he was defending his shop*'. It neither speaks of the danger to the employees nor of a critical situation, with the jeweller was under threat. The ground states that the jeweller wanted to protect material possessions, and this intention is perceived as sufficient to justify a shot at a man in the torso, while his gun was pointed at the floor.

The ground is in a way commensurable to the justification of self-defence, which allows a person to use force and cause harm to stop an imminent unlawful aggression. According to the narrative, the jeweller was using his right to defend legally protected interests: '*his shop*'. The narrative, however, approves of the reaction regardless of the legal requirement that uses of force must be absolutely necessary.

According to state law, however, though the jeweller was acting in defence of his shop, he nonetheless had to comply with higher standards of necessity, being required to find less harmful alternatives and not to harm lives to protect material goods. The jeweller was not permitted to defend his shop with a lethal shot; he could only ultimately do that to defend the lives of his employees if he had no other alternatives available. However, the narrative speaks of his '*shop*' and later fails to consider if shooting at the man was absolutely necessary. Arguing in this way, the narrative inverts the legal priority of lives over goods: it gives material possessions more value than lives and ignores considering whether alternative reactions were available, something that judges would do.

To decide if the shot was necessary, a judge would consider the jeweller's options. He was a trained shot and arrived on the scene unnoticed by the suspects and he had other options. He could, for instance, ask the man to drop the gun and shot him in the legs or arms, as he was shooting at very

close range. In fact, he was required to be restrained and moderate in reacting.

This narrative thus shows that a gap between state law and the living law can open up when citizens, overestimating the value of material private possessions, fail to consider if a citizen, enforcing the law, should opt for the less harmful alternatives available. In doing so, it fails to weigh the additional requirements of moderation imposed on a person with special skills.

He had been robbed three times before

Two narratives approve with an emphasis on the fact that the jeweller had repeatedly been a victim of robbery. One of them states:

> *I understand why he fired. They had robbed him two or three times before, I think. He was defending his possessions* […] (36)

The argument in this narrative binds the previous experiences of the jeweller with this new event. The fact that the jeweller had repeatedly been a victim of robbery appears to be a good reason to approve of the reaction. The narrative stresses, moreover, the fact the jeweller '*was defending his possessions*', as if in previous experiences the jeweller had been unable to do so, and for that reason his reaction should be more sympathetically 'understood' now. A few moments later, when the respondent was asked to evaluate from the position of a judge, I heard:

> And if you look at it as a judge?
>
> *I would show understanding* […] *for the situation he was in, and that this had happened to him two or three times before* (36)

The narrative clearly speaks of 'understanding' without saying that the reaction was 'good' or 'right', as if there was indeed something questionable in the act that should not be reproached.

In another fragment, this same narrative recognizes that the jeweller acted drastically:

> *He could have shot him in the legs…* (36)

Although the narrative recognizes the jeweller could have caused less harm, the judge should not blame him for shooting straight at the torso, because he had already been robbed before. The narrative thus articulates the idea that judges should be more lenient when a person has repeatedly been victimized by property crimes. The narrative does not explain why repeated victimization makes those actions excusable. It gives no further explanation as to whether this was a question of common sense: those who are

recurrently victims of crime will be prone to react more drastically than those who are victims for the first time.

In these terms, the narrative, though approving of actions that are beyond the law, uses grounds oriented by principles valid in the legal sphere. Previous experience of victimization can produce an emotional outburst that makes excessive reactions understandable, which in turn can be argued before a court to excuse the actor for failing to comply with the limits of absolute necessity as an improper use of the self-defence.

However, to succeed with this excuse before the court, the strong emotions would have had to have been the direct consequence of the actual aggression, and these emotions be the reason why the person reacted drastically and disproportionately. A 'double causality' was necessary. Otherwise, for the act to be excused as a 'psychological *force majeure*', it would have to have at least been necessary to prove that the jeweller acted under the influence of an 'unbearable psychological pressure', hindering him from acting within proportion.

However, the jeweller additionally had to comply with higher requirements of moderation and self-control. He had better options that he did not take, as he was a skilled shot and had an advantage over his aggressor.

The narrative shows us that a gap between state law and the living law can open where people consider previous experiences of victimization as enough of an excuse for drastic reactions, ignoring that double causality is required or that those emotions must be 'unbearable'. This is also difficult to argue successfully in accordance with state law if the actor had been under an obligation to exercise greater moderation and self-control by virtue of possessing special skills.

The prohibition of retaliation in the living law

When we studied state law, we learned that citizens are not criminally liable if they harm protected interests in enforcing the law, provided that they are reacting to immediate unlawful dangers (De Hullu, 2012). According to the principle of immediacy, if a danger is imminent, present or a suspect resists his or her arrest, proportionate and necessary harm cannot be criminalized. However, when harm is caused after the danger ceased, or when the suspect does not resist the arrest, the actor is no longer justified. If he causes further harm, he could ultimately be excused if he or she acted under the influence of strong emotions, or under a psychological pressure produced by that danger. If not, the judge will consider his act a fresh aggression, and find him criminally liable.

Using the vignette of the robbery at the supermarket, I studied how far this principle exists in the living law. In the vignette[75] the supermarket owner

[75] For a more detailed description of the case see page 67.

punched the suspect in the face as the latter lay on the ground with his hands tied. I wanted to know how people ground approval for a retaliatory act.

I will now present narratives that support such an act using hegemonic arguments.

He was still angry

One narrative considers that the supermarket owner should not be blamed for hitting the man because he acted out of anger. The narrative says:

> *I find the reaction understandable* [...] *because he was angry. The cashier was in shock, he lost €540, he ran, he was angry, so he hit the man* (31)

The narrative does not approve of the act in itself, but puts forward reasons to explain why the supermarket owner acted the way he did. To do so, the narrative binds together the original aggression, the act of chasing after the suspect, and the battering of him in a continuum, wherein emotions appear to be the motor driving the owner's actions.

We see that the narrative underlines the influence of strong emotions on the reaction, and in doing so, it greatly resembles the defence-excuse of the 'improper use of the self-defence'.

This narrative observes that the excessive reaction of the supermarket owner occurred immediately after his store was robbed: he ran after the suspect and caught him. The reaction is understandable because it was the result of those emotions. He did not have a real or cold-blooded intention to attack, but was trapped by emotions he could not control. For this reason he should be excused.

Despite its proximity to a legal defence, the narrative reconstructs the situation in a way that the judge did not, and also gives emotions a meaning that a judge would not give. In this case, the judge focussed on the fact that the man beat the suspect up while the latter was defenceless and could no longer resist arrest, because he was lying on the ground with his hands tied. The judge found that under those circumstances, the supermarket owner should have controlled his emotions. Time had passed from the moment of the robbery. The supermarket owner had the opportunity to calm down and he should have done so. The act was reproachable and the owner was therefore convicted.

The narrative thus presents two important differences to the arguments relied upon by the judge: first, it focuses on the emotions of the supermarket owner, while the judge focuses on the defencelessness of the former aggressor. Second, the narrative argues that emotions controlled the

supermarket owner, while the judge argues that the latter was obliged to control his emotions.

We know that for conduct to be punishable in criminal law, it must be subject to reproach: this requires a judge to perform a normative evaluation of what was expected of the suspect. To do so, the judge considers what a 'good citizen' would do in such a situation. In the case of the robbery at the Albert Hein supermarket, the judge considered that the supermarket owner, as a 'good citizen', should 'control himself', instead of giving vent to his anger. This narrative, conversely, argues that he could not control himself.

The narrative therefore reveals that a gap between state law and the living law can open where the law evaluates actions according to 'objective' standards: what a hypothetical 'good citizen' should do; and people evaluate according to 'individualistic' or personal standards: what 'the one' in the case 'could' do.

Subversive Grounds

Grounds are subversive when they challenge the established distribution of authority over coercive means: in other words, when they defy the supremacy of the state in the use of force, claiming that use for citizens (Ewick and Silbey, 1998:225). Operationalized, this idea proposes that grounds are subversive when they disregard principles of proportionality, absolute necessity and immediacy and put forward other principles, incommensurable with the law.

The following are the subversive grounds people put forward to support actions that contravene principles of proportionality, absolute necessity and immediacy, the latter against the prohibition of retaliation.

The principle of proportionality in the living law

A basic idea in criminal law is that citizens cannot produce disproportionate harm in enforcing the law. This means that the harm they produce reacting to a crime cannot be of an excessively greater value than the harm the same crime produced. Material goods cannot be defended at the cost of lives.

Some disproportion could ultimately be excused, if the actor was governed by strong emotions or an unbearable psychological pressure.

Using the vignette of the handbag snatching, I collected the following narratives that ground their approval for disproportionate acts with arguments incommensurable to this principle of law.

Play with fire, get burned! (*Eigen schuld dikke bult*!)

Eight narratives ground approval for the woman's reaction by stating that the original aggressor was responsible. This is put forward, for instance, in the following:

> *Bad luck, he shouldn't have been stealing. He died, yeah … bad for the boy* […] (25)

The narrative grounds approval in a new way, different from the narratives we saw above. This narrative neither considers how everything happened, nor if the woman in the car was at fault.

This narrative bluntly asserts that the man had '*bad luck*'. According to the dictionary,[76] luck is success or failure brought by chance rather than through actions. Does the narrative therefore mean that the young man died by chance, rather than as the result of human actions? The narrative says: '*he shouldn't have been stealing*'. This appears to mean that the young man died not by chance but as a consequence of the fact that he tried to steal. The death of the young man is thus his own fault.

Furthermore, the narrative sees the result as only '*bad for the boy*'. We thus conclude that the result in itself is not disapproved of, as though there is nothing to regret, it is only bad for the boy.

Another narrative is clearer on this point:

> […] *that's his own fault, bad luck, you shouldn't have stolen my bag, and if you do, these are the consequences, bad luck* (34)

In other words, these narratives say that the former aggressor must bear the consequences of his actions because he tried to steal. He who plays with fire, cannot complain of getting burned. Neither of the two narratives express any sorrow for the death of the young man, and this is their important common feature. Sorrow is a lamentation for a loss, an expression of grief for something that used to be part of our world, and which in the future is going to be missed.[77] Sorrow is a sympathetic sentiment, which views another as part of oneself, but this sentiment of sympathy is absent from these narratives. The young man who stole the bag is an alien, someone who does not take part in a common world with these narrators. Because he stole the bag, and from the moment he did so, all common feelings with his misfortune are gone. He can be eradicated.

These narratives reveal the gap between state law and the living law in a new way, where citizens do not evaluate the proportionality of reactions but blame the suspect for any harm he or she suffers when the former victim reacts.

As a ground for approval, this is subversive to the idea that state organs centralize the use of physical force and citizens can only exceptionally use it

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76 The New Oxford American Dictionary.

77 The New Oxford American Dictionary.

proportionately in self-defence. The narratives justify all possible reactions, without evaluating them for their proportionality.

The police cannot come on time

Two respondents approve of the woman's reaction by arguing she had to do it. One of them said for instance:

> *The man is dead now but if she hadn't done anything except waiting for the police, he would have* […] *run away. Then both thieves would be alive and she would have lost her bag* (2)

This narrative grounds approval on the conviction that driving after the scooter, and over the man, was the only way for the woman not to lose the bag. Here, the death is a means available for recovering the bag. Furthermore, we see no signs of regret for the death of the young man. No matter whether the woman intended to run into the scooter or not, the outcome is approved of because the police could not provide for her safety.

By saying that if '*she hadn't done anything except waiting for the police, he would have* […] *run away*', this narrative is telling us that 'waiting for the police' is senseless because neither could they come to catch the offenders on time, nor could they recover the bag afterwards: if she had not gone after them, '*she would have lost her bag*'. In these terms the narrative conveys the image that those who are robbed on the streets have two choices: either wait for the police (and lose their property) or chase after the thieves, whatever consequences this might bring.

This way of grounding approval is subversive, because disregarding all constraints in reactions, it approves of citizens acting beyond the limits of proportionality when assuming as their own the authority to provide for what the state 'will not': protection and law enforcement. In doing so, the narrative reveals that the gap between state law and the living law can open when citizens, assuming that the police can neither come on time to help nor later find the perpetrators of crimes, feel it as their own responsibility to act using their own forces, no matter how drastic their actions or how far-reaching the harm they produce.

Sweet lazyland

One narrative approves of the actions of the woman, arguing the laws in the Netherlands are too soft. The narrative states:

> [...] *It's all a mess here, sweet lazyland; of course not for those who work. The big baboons are walking around.* […] *And is <u>that</u> all right?* (25).

This last narrative approves of the reaction by arguing that laws in the Netherlands are too soft, and it is quite descriptive in defining this. The

narrative gives a chaotic picture of the Netherlands (‘*lazyland*’), where everything is ‘*a mess*’. We can understand this idea through the reference the narrative makes to those ‘*who work*’, and ‘[t]*he big baboons*’.

The image of *lazyland* conveys a world turned upside down. A world where some people work and others take profit from them. In this ‘*mess*’ of a society, the lazy and brutish, ‘*the big baboons*’, have the right to be ‘*walking around*’, while working and law-abiding citizens look on in frustration, victims of the former. A messy land, where there is no authority turning ‘wrong’ into ‘right’.

Lazyland is a sweet paradise, but only for those who do not work. The last sentence of the narrative, moreover, in being a question (*And is <u>that</u> all right?*), compels others (us) to re-think what ‘right’ and ‘wrong’ really are, as if the limits of state law were no longer trustworthy. Should we approve of the brutish taking profit from workers, or rebel against them, giving the ‘right’ to the woman in the vignette?

The ground, as we see, neither evaluates the intentions of the woman, nor does it offer a definition of the events that would excuse her for the results. The narrative approves of the action and its results by simply proposing that citizens do what laws do not.

The structure of this argument is strongly reminiscent of what Garland (2001:98) calls a ‘reactionary’ vision of society, wherein ‘permissive’ policies and liberal rights are held responsible for current social problems: among them, criminality.

This narrative reveals that the gap between the living law and state law can open where people, managing a ‘reactionary discourse’, distrust law by claiming for law-abiding citizens the right to punish those who commit crimes. The narrative is thus subversive, because it pursues an order that competes with that of the *rule of law*, where, by *imperium* of the legality principle, only state law prescribes what conduct is criminalizable, and the due process to punish perpetrators.

The principle of absolute necessity in the living law

Citizens who harm legally protected interests when enforcing the law will not be punished if the harm was absolutely necessary. Citizens should always choose the least harmful means available, and produce the least possible harm.

I used the vignette of the robbery at the jewellery shop to understand the grounds for approving action beyond this legal limit. When respondents approved of the jeweller shooting, I asked further questions to learn about the arguments for doing so.

The jeweller, in the actual case, as a trained shot, could have attempted a less harmful shot, which according to my legal analysis, opened him to conviction.

Now we will see the arguments people use for approval that are incommensurable to the principle of necessity.

He came with a gun, he started it

Two narratives approve of the jeweller shooting the man in his shop on the spot, one of them saying:

> *He came with a gun and thus, he wanted to shoot. So, I shot him. He comes with a gun, then I come with a gun. I'm not the one who started it* (10)

This narrative, despite appearing to express the willingness of the narrator to shoot ('*I shot*'), is actually grounding approval for the jeweller. The ground, as we see, focuses on who '*came with a gun*', as if this fact was enough to decide if the use of the gun was necessary.

The narrative departs from the assumption that the person who came equipped with a gun (the suspect) '*wanted to shoot*'. But does the narrative say that the situation was so threatening that using a gun against the armed suspect was absolutely necessary? Lets us find an answer through another fragment of the same narrative:

> *He* [the suspect] *has a gun, that's stupid. It is stupid to point it at the ground* (10)

Visibly, the narrative does not perceive the situation as greatly threatening, for it remarks that the robber was not aiming at anyone, he was not actually using the gun, and that was '*stupid*'. The image conveyed seems to be that a person with a gun in his hand must point it at someone and be willing to shoot at any time, and to do the contrary is stupid because then he will be shot. Putting both fragments together, we understand that when the narrative estimates that the suspect '*wants to shoot*', it does not mean that the man is about to shoot, but that a person carrying a gun is willing to shoot, and thus if the suspect is willing to shoot, why should the wronged person not?

From the position of the wronged person, the narrator says that '*me*', the victim, cannot be blamed, and in this sense the identification of the narrator with 'the victim' is a potent instrument in the argument. Through identification, this narrative can approve without major risks of losing face: 'I' would shoot at someone, no matter what he is doing, because he came to attack me with a gun. It is a question of 'me or you' and the robber was wrong first. The narrative thus argues that the jeweller, as a victim himself,

can strike no matter how hard. The jeweller can never be wrong, because the only 'wrongdoer' is the one who attacked first.

As a strategy for grounding approval, the narrative consolidates two roles in the events: that of 'the wrongdoer' and that of a 'wronged person'. These two roles seem not to change during the events, though the balance of power between the participants in the events changes.

In conclusion, the jeweller's action is understood as the rightful act of redress of the victim of an attack. In this sense, the ground sounds much like the justification of a retaliatory act.

Frijda (1994:264-265) defines retaliation as an act designed to harm someone, in response to harm endured, whereby the act is not designed to stop harm from occurring. The difference between defensive acts and vengeful acts resides for Frijda in the intentions. Defensive acts seek to stop harm from occurring, while retaliatory ones want to equalize the suffering by inflicting pain on the person causing us pain. Evening up the suffering, the avenger wants to correct imbalances in power (Solomon, 1999). To even up the suffering is to try to remove part of my powerlessness by showing my former aggressor his own powerlessness.

The narrative shows us that the gap between the living law and state law can open where citizens accept that victims may cause harm in return for a harm they have endured. This defies the principle that citizens can use force and cause harm only when this is strictly necessary to defend themselves or to arrest suspects. According to the legality principle, citizens' interests cannot be harmed outside of due process. When this narrative approves of the idea that the wronged person may define when and how much harm can be caused to the wrongdoer to even up the harm, the narrative is subversive to that principle and denies the civil liberties it assures.

The prohibition of retaliation in the living law

To state law, citizens are not criminally liable if they cause harm in reacting to immediate unlawful dangers. The principle of immediacy forbids that reactions should begin or continue after a danger has ceased. Retaliatory harm is punishable, unless the actor can be excused for being under the control of strong emotions or a psychological pressure immediately produced by that danger. If the actor cannot prove this, a judge will consider his act a fresh aggression, and find him criminally liable.

To learn the extent to which this principle can be found in people's arguments for approving of unlawful acts, I used the case of the robbery at the supermarket. When respondents approved of the supermarket owner punching the arrested man while the latter lay on the floor, I asked for their arguments for doing this.

We will now look at the subversive grounds put forward against prohibitions of retaliation.

They are too soft with punishments here

One narrative approves of the supermarket owner, complaining about the lax punishments in the Netherlands.

> *Very good! You know what? They are too soft with punishments here, nobody is punished* [...] *They set them free, they are too weak. The government must be much harsher…* (25)

This narrative approves of the supermarket owner hitting the man he just arrested, complaining about the leniency of the criminal justice system in the Netherlands. The narrative is quite descriptive about what this embraces: sanctions are perceived as too lenient ('*too soft with punishments*'), too few people are put into jail or receive sanction ('*nobody is punished*'), and to cap it all, suspects are released too early ('*They set them free*'). In saying so, the narrative complains about punitive measures and the coercive means, all of them being too lax.

However, the narrative also reveals another idea. When it says '*nobody is punished*', it conveys the image that though a lot happens, though many crimes occur in society, only a few or '*nobody*' is punished. In these terms the narrative reveals a tension between two perceptions: that 'a lot happens', and that those with the authority to do something about it – the criminal justice system – are failing. The proposed solution to the tension is more punishment, more people in jail, for longer periods.

Summing up, the narrative approves while making no evaluations of the act itself. Physical force and harm are approved of without major temporal restrictions, blaming the law and the criminal justice system as a whole, claiming for citizens the function of controlling crime.

We see the gap opens where citizens, disappointed at the law and the criminal justice system – either of its performance or its rules – approve of taking over its functions. The narrative is thus subversive, because defying the principle of immediacy, it consents that citizens should replace the state in effecting punishment.

The thief was wrong first

Five narratives approve of the supermarket owner's violence, arguing:

> *I wouldn't find him guilty*. *The man was a thief* […] *the thief is wrong in the first place.* (14)

The main argument to approve of the supermarket owner battering the suspect is that '*the man was a thief*'. This categorization is the basis for

distinguishing whether actions against someone are acceptable or unacceptable.

The narrative assumes that the victim's actions were wrong in saying '*I wouldn't find him guilty*'. There is no plain approval for the act, but the victim cannot be blamed because the thief was wrong '*first*'. Thus, both were wrong, but the one who started it should be blamed.

Further on, the narrative is silent on whether force was necessary or proportionate to the resistance offered to the arrest. What the supermarket owner does to '*the thief*' is acceptable because the latter was wrong first.

In conclusion, disregarding necessity, this narrative approves of the supermarket owner striking back in repayment for the attack he endured. The narrative sees in the reaction, putting it in Solomon's words (1999), an act balancing the suffering, and approves of it.

The ground does not resemble any legal category. The court sanctioned the supermarket owner because he started a fresh aggression. Thus the gap between the living law and state law that is revealed here appears to open where 'the victim' can strike in revenge, as if the difference between wrongdoers and wronged persons was a matter of 'nature', with wrongdoers being always bad and having to bear the consequences of their acts, and victims being good, no matter what they do. The narrative is then subversive because – in denying that citizens can only use necessary physical force when confronted by immediate dangers – it supports citizens dealing out punishment.

Motivating Willingness

Motivating is a social act performed in a situation where a respondent, after expressing preference for a hypothetical course of action (willingness), offers arguments favourable to that course of action. A motive consists of the arguments people put forward to support a preference for one course of action over others.

Motives structure arguments in different forms: arguing that an action is right, or stating that someone could not be blamed for acting in a certain way. A narrative argues that an action is right when it gives reasons in favour of the act. For instance: '*you run for your possessions… you don't let them steal your things*'. Here, the same act is accepted because the actor is trying to protect private possessions.

The other way of arguing is that, though the preferred action is questionable, no one could be blamed for acting in that way. For instance, saying: '*I think it's wrong, but you react like that* […] *it's just an emotional reaction*'. The preferred course of action is seen as wrong, but we excuse the person for acting emotionally.

I analysed the arguments used to support the preferred action in the 47 narratives collected that approve of or express a willingness to act beyond the law. My analysis of narratives will show how arguments are articulated and if they are hegemonic or subversive, according to the extent that they support or deny the supremacy of the state in enforcing the law. As we can see below in Table 5, narratives offer both kinds of motives, supporting and denying the monopoly of the state over forceful means in society. In the following pages, we will analyse those motives as a second step in gaining understanding of the gap.

Table 5: Motives

		Disproportionate	Unnecessary	Retaliatory	Pre-emptive	Total
Motives	Hegemonic	3	2	0	1	6
	Subversive	3	1	1	0	5
	Total	6	3	1	1	11

Hegemonic Motives

Motives are hegemonic when they conform to the established distribution of authority over coercive means in society (Ewick and Silbey, 1998: 225). In this research, I term as hegemonic those motives that uphold the monopoly of the state in the use of physical force, and restricting this use by citizens to exceptional circumstances. Operationalized, we understand motives as hegemonic when they are oriented by principles of proportionality, absolute necessity and immediacy.

In the following pages we will learn the hegemonic motives people put forward to prefer actions that contravene principles of proportionality, absolute necessity and immediacy, the latter disregarding the prohibition of pre-emptive harm.

The principle of proportionality in the living law

When citizens cause harm in law enforcement, according to state law, they will not be reproached if the harm was not disproportionate to the interests defended. If a person kills a suspect to defend material goods, the actor will be punished unless he or she proves an excuse. Excuses are exceptions the law makes in cases where strong emotions or an unbearable psychological pressure prevent the actor from being proportionate, or when harm occurred despite the person exerting maximum precaution to avoid it.

I used the case of the handbag snatching to study how people could be motivated to act against this principle. In the vignette, a woman rushes after a person who had just snatched her handbag, until she ran over the suspect, killing him. On hearing that a respondent would do the same thing

(expression of willingness), I searched for the arguments to support that willingness.

The woman was reproached in court because though she might not have intended to run over the scooter, she acted recklessly. To drive backwards and fast meant taking disproportionate risks that she should not have taken.

The following are narratives, which though contravening that principle, are hegemonic.

You run to save your possessions

One narrative expresses willingness to drive after the scooter to defend private possessions, saying:

> *It's my bag!* […] *You run to save your possessions. Your stuff is inside, cards, keys, everything is inside* […] *You don't let them steal your things* (25).

Though this narrative seems merely to be describing an action when saying '*you run for your possessions*', the statement is actually part of the argument used to support a preference for driving backwards after the scooter. This argument combines three elements: it refers to the woman's private property, to the value of that property and to the aggression itself.

The expression '*It's my bag!*' underlines that when private goods are stolen, one ought to defend them. The right to private property signals clearly that the owner is reacting to an illegitimate attack.

The enumeration of the goods: '*cards*, *keys, everything is inside*' qualifies that private property. The statement signals that valuable and not irrelevant things are inside. Acting in that way is felt to be proportionate because cards, keys, etc. are important things, important enough to cause someone to act.

Finally, the narrative tries to convey support for the reaction on the basis that the whole occurrence is an aggression. Stating '[y]*ou don't let them steal your things*', the narrative signals that those driving the scooter ('*them*') attacked the woman in the car. By trying to '*steal*', they violated everyone's right to private possessions, and that gives everyone the 'right' to fight for them.[78]

[78] This interpretation of the events contrasts with other narratives' interpretations. Some, for instance, felt that the act of carrying a bag on the passenger seat, with the passenger door unlocked, was such an imprudent and almost reckless act that it overrode the 'right' of the woman to defend her possessions.

As we see, the idea of defending material private possessions plays a central role in this argument, where the preferred course of action and the harm it could cause is perceived as the 'right way of acting', and the harm as proportionate. In this sense, the narrative uses an argument oriented by state law: proportionate self-defence. The motive, however, departs from legal norms and principles because material possessions, by law, cannot be defended at the cost of lives. The narrative thus reinterprets the principle of proportionality by giving a handbag with '*cards and keys*' inside more value than the life of a suspect.

This narrative thus reveals that the gap between state law and the living law opens where people fail to weigh proportions in the way that a judge would. A judge raises requirements of caution for the actor when material interests are being defended. This narrative, contrarily, gives material interests pre-eminence over the life or physical integrity of suspects.

It's just an emotional reaction

Two narratives put forward emotions as the motivating force:

> *My personal belongings are in there, and I am in the car. I would feel indignation because that happened. That is your reaction and I think it's wrong, but you react like that* […] *You engage reverse and you try it; it's just an emotional reaction* (31).

Two aspects are important in this narrative: first, the resort to emotions in the argument; second, the appreciation that the preferred action is wrong.

The narrative speaks of '*indignation*', which according to the dictionary[79] relates to feelings of anger or annoyance produced by something perceived of as unfair. However, what causes such an emotion? Of course this appears to be consequence of the handbag snatching, but the narrative is more descriptive here, it evokes two images: first, that '*personal belongings*' are being taken; and second, that this is being done from inside the car ('*and I am in the car*'). The perception that someone is unfairly treated thus refers to the sense that the private sphere is being violated in two ways: someone unauthorised takes '*personal belongings*', and this in turn violates the private space of a car. These two aspects of the event appear to amount to such a disruptive experience that it could cause someone to do something reckless to a suspect, despite that being wrong.

This narrative also argues that such an emotion could make the narrator act '*wrongly*'; one could forget all considerations of the risks, '*engage reverse and try it*'. Analysing the emotion of indignation, Solomon (1999:104) remarks that it is one of many emotions intimately related to our sense of justice. He calls indignation an 'antipathetic' emotion, because far from

[79] The New Oxford American Dictionary

enabling us to understand the needs of others (as with sympathetic emotions), it makes us blame someone else for the perceived violation of our needs, and to claim for them.

What this narrative thus tells us is that emotions could govern actions, and that though aware of constraints, a person could be at the mercy of emotions and act against someone. Emotions can overwhelm rationality, and who could be blamed for that?

The way this narrative places emotions at the centre of the motive is hegemonic. The 'improper use of self-defence' excuses an actor who, overwhelmed by emotions, causes disproportionate harm in reaction to an illegitimate aggression. We saw in the legal chapter that people defending material goods first carry greater requirements of proportionality: they cannot harm lives to defend material possession. Second, drivers must act objectively as 'prudent drivers' and thereby have greater requirements of self-control in traffic.

In this sense, the narrative does not defy legal principles but enforces them in recognizing that the preferred act would be *wrong* for being disproportionate; but it does reveal the gap: where state law requires caution and self-control over emotions as an objective requirement, the narrative gives pre-eminence to emotions over objective standards of self-control.

The principle of absolute necessity in the living law

From state law we know that harmful acts are justified in citizen law enforcement when they are absolutely necessary. This is the case when the actor had no less harmful alternatives to hand. However, if he had, the actor can be punished. Exceptionally, he could be excused, if he was moved by strong emotions or by an unbearable psychological pressure produced by the same danger he resisted.

I used the case of the robbery at the jewellers shop as a vignette to learn how this lives in people. When I heard a respondent expressing a willingness to enter the shop and shoot at the suspect, I sought their arguments for doing so. Of course, I did not inform the respondents that according to my analysis of state law, the jeweller had caused unnecessary harm because his skills and strategic position allowed him to produce a lesser harm.

These are the hegemonic motives I collected to support causing unnecessary harm.

I wouldn't let them rob me that easily

Two narratives express a willingness to shoot at the suspect to prevent private possessions from being stolen, stating:

> *It was his own shop, those people must work very hard for their shop, and have expensive things in there. They wouldn't let them rob them that easily* […] (34)

Here, willingness to shoot is supported with the argument that a person can protect private material possessions. The narrative is not speaking about protecting the lives of the employees, but that there are '*expensive things in there*', '*it's your own shop*'.

In these terms, the narrative appears to claim for everyone the right to defend material possessions against unlawful aggression using privately owned firearms. The belief that there was an illegitimate aggression in process is revealed by the statement '*people must work very hard for their shop*'. Work provides legitimacy for possessions, and a person can prevent others from '*robbing them*' without the right to.

When the narrative uses the phrase '*wouldn't let them rob them that easily*', it conveys the idea that attacks against material possessions merit drastic reactions, including shooting a man who is not directly threatening you with his gun. By doing so, the narrative inverts the order of priorities state law establishes between material goods and lives, and disdains of harmless alternatives, disregarding whether causing harm is absolutely necessary or not. Those whose material interests are attacked, asserts this narrative, can react with all force because they are not obliged to mitigate the dangers inherent in their assailants' attempts by reacting moderately.

Looking at this narrative from this perspective, we see that it is hegemonic because it claims the right of self-defence the criminal law recognizes, but reveals the gap with state law, when it disregards less harmful alternatives.

The prohibition of pre-emptive strikes

In citizen law enforcement, state law compels citizens never to begin attacks, but to react to unlawful aggression.

To study why people are willing to act pre-emptively, I confronted respondents with the case of the fight in the bus. When respondents stated that they would hit the man, I asked about their arguments. In analysing their arguments I wanted to know why they would act that way, and to understand how this argument could be hegemonic, even though the act is unlawful.

Because he touched me

One narrative expresses a willingness to shove the man away and then knock him down, stating:

> *Because he was doing something to me, he touched me. I didn't touch him* □..□*he started it*' (10)

We saw this narrative before, expressing a willingness to hit a man after shoving him away. Now we know the reason: '*he touched me*'. According to this narrative, the attack begins from the moment a threatening person touches another. From that point on, a person is entitled to self-defence. The narrative does not consider if after the touch it is necessary to hit. For the narrative, after the first physical contact, the aggression began ('*he begins*') and does not stop. Judges, however, see it differently.

To state law, we saw, a threat of physical attack must be imminent to justify self-defence, as fear does not suffice. Judges evaluate the imminence and the necessity of the defence by looking at the moment right before the defensive reaction. If the actor managed to distance himself from the threatening person, by shoving him away for instance, the aggression is not imminent anymore. The bumping of chests is an imminent aggression only if the threat does not stop, but from the moment the persons gained distance from each other, the aggression is no longer imminent unless the former aggressor approaches again to land a blow. The bumping of chests, once this is over, could be seen as a simple provocation that cannot justify any act in self-defence.

Viewed like this, the narrative is hegemonic as the alleged motive for reacting is the defence against an aggression. However, judges interpret events differently. The narrative perceives that the aggression begins and continues, no matter that the actor put some distance between him and his assailant. Judges dissect the events, making a detailed, part-by-part analysis, wherein they consider at each stage the imminence of danger and the necessity of the harm. This narrative, in contrast, holds that a citizen can look at events as a continuum, and where once a threshold is crossed, the reaction is justified.

Subversive Motives

Subversive motives defy the supremacy of the state in the use of physical force, as they also claim for citizens the use of force to enforce order in society (Ewick and Silbey, 1998:225). Operationalized, motives are subversive when they disregard or even rebel against principles of proportionality, absolute necessity and immediacy.

In the following pages we will learn about the subversive motives people offer to prefer actions that contravene principles of proportionality, absolute necessity and immediacy, the latter disregarding the prohibition of retaliation.

The principle of proportionality in the living law

A person who harms legally protected interests in enforcing the law, does not commit a crime if the harm is strictly proportionate, which basically means that a life is not the price for defending material goods.

To learn about the motives of people crossing this legal limit, I used the vignette of the handbag snatching. When I heard respondents express a willingness to act as the woman actually did, I asked more questions to discover their underlying arguments.

The woman was convicted because she took unacceptable risks and caused excessive harm.

The following are arguments people use as motives, which are incommensurable with the principle of proportionality.

A question of principles

One narrative mentioned that the contents of the bag were not relevant at all to driving after the scooter and to running it over. Something else was more important:

> *I don't care what's in the bag if they snatched it* […] *I'd go after them anyway, it's not about the contents of the bag* […] *You just cannot steal stuff from other people* (36)

It makes no difference to this narrative what was in the handbag, whether it was a large amount of money or nothing at all. The narrative speaks of going '*after them anyway*', because '*it's not about the contents of the bag*'. Going after the scooter would not thus have the goal of rescuing the bag or its contents. The narrative does not even regret the loss of private possessions. The goal actually seems to be another.

When the narrative concludes that: '[y]*ou just cannot steal stuff from other people*' we understand that the goal is enforcing this general norm. One goes '*after them*' not because of the bag, but because the youngsters did wrong, and one should do something about that. Reacting is thus a question of principles: 'thou shalt not steal'. But who should enforce this principle?

Remember that the events happened in the street, in a crowded neighbourhood, at rush-hour. This narrative, however, conveys the view of everything happening in a sort of deserted place, where the victim is on her own, counting on no one else beside herself. We heard: '*I don't care what's in the bag* […] *I'd go after them anyway*'. No one else counts before acting, no one helps, no one else counts in measuring the risks of the preferred reaction. One is on his or her own.

If the bag is irrelevant, as much as proportion or risks, private forces can be used in disregard of all proportion. Hence, this narrative shows that a gap opens between the living law and state law where citizens claim the authority to use physical force to enforce a general norm, and in doing so disdain of all precautions and proportion. The narrative thus offers an argument, which is subversive of the principle that in a rule-of-law system

citizens can only exceptionally use their own forces – and within strict limits of proportionality – as the state centralizes the use of forceful means to enforce the law.

Let them see that something happens

One narrative supports driving after the scooter and running into it, expressing the desire to give a signal to perpetrators:

> [I'd do it] *to scare them and to let them see that something happens* (27)

The argument centres on two goals for running over the scooter: to '*scare'* them and to show them that '*something happens*'. The said action communicates to '*them*', those who attempted the robbery, a message. Going after the scooter has a performative character. The narrative neither speaks of recovering the stolen goods nor of catching the perpetrators, it intends (in the first place) to produce fear. To scare someone means to cause someone fear of suffering evil.[80] Causing fear is the recommended response to a handbag snatching.

The second goal mentioned is '*to let them see*' something. Though the narrative connects both goals with '*and*'; we understand that the aim of scaring the drivers of the scooter is not independent from the goal of having them see something, but the means of transmitting the message. What is that message?

The narrative speaks of having them see that '*something happens*'. Through the preferred action, perpetrators should become conscious of the consequences of their acts and 'fear' these consequences. The perpetrators should see that evil could happen to them as a consequence of their endeavours, and that this should 'scare them'. Fear is thus a means *utile* to confronting the perpetrators with what they did. In addition, the narrative wants to have them see that '*something happens*'. Can we interpret the term '*something*' as the opposite of 'nothing'?

If the victim's reaction is what confronts perpetrators with what they did, because otherwise nothing would do it, this narrative seems to depart from the assumption that the young men who snatched the bag have nothing to fear about what they did. It conveys the idea that although something should be done, if the wronged person does not do it, 'nothing happens', and perpetrators do not fear the consequences of their felonies.

The narrative thus reveals that the gap between the living law and state law opens when citizens are motivated to engage themselves in harmful reactions to deter assailants through 'fear', fear of suffering pain.

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80 The New Oxford American Dictionary

On this point, the narrative is subversive in assuming for citizens the task of, in criminal law terms, 'special prevention'. One of the functions of sanctions is to prevent assailants from committing felonies out of fear of suffering the pain of sanctions. This function is reserved for the criminal justice system in modern society.

Prisons are full of this scum

One narrative expresses a willingness to go after the scooter and to run into it, by referring to prisons in the following way:

> *If I were her, I'd do it too* [...] *prisons are full of this mucky scum. Do you have to let everything happen?* (25)

During the interviews, some respondents recognized the case of the '*tasjesdief*' behind the vignette of the handbag snatching. This narrative is one of those where the willingness it expresses is to do the same that the woman in that case did: namely, to run over the scooter and the young man on it.

Here, the motive is clearly not to recover the bag, but refers to an image this narrator has of perpetrators and prisons. To this narrative, the young man who tried to steal the bag is just '*mucky scum*', which means some sort of 'dirt'.[81] The dictionary says the term can be informally used for persons or groups, to convey the sense that they are contemptible or worthless.

The narrative also states a cynical view of prisons. Prisons are regarded as being full of dirt. When it asks '*Do you have to let everything happen?*', it seems to mean that prisons do not manage to make of that '*scum*' meaningful people, that those people are incorrigible, and that prisons are simple warehouses. If nothing good can be done with perpetrators, they are just 'dirt', and why should victims then care about them and *let everything happen*?

The whole picture reveals that a gap between the living law and state law can open where people assume a cynical attitude with respect to suspects and the criminal justice system, where they believe that perpetrators are not worthy of human treatment and the criminal justice system is not able to bring something 'good' out of them. This narrative is thus subversive in disregarding proportion by considering that the life of a suspect is not worthy of due process and treatment.

The principle of absolute necessity in the living law

Citizens who harm legally protected interests when enforcing the law will not be punished if the harm is absolutely necessary. This principle means

81 The New Oxford American Dictionary

that a citizen should always choose the least harmful means available and produce the least possible harm.

The vignette of the robbery at the jewellery shop served me as an instrument for learning about the motives people offer for crossing this legal limit.

When respondents said they were willing to enter the jewellery shop and shoot the man standing there, I asked about their arguments for doing so.

The jeweller, in the actual case, should have been convicted because he shot on the spot and at the chest, though he could, as a trained shot, have attempted a less harmful shot, especially considering that the suspect was pointing his gun at the ground. We will now see the arguments people offer as motives that are not oriented by, but are incommensurable to, the principle of necessity.

It's his fault

One narrative expresses a willingness to shoot, blaming the robber:

> *…then I'd take it downstairs, then I'd use it* […]. *It is his fault* […] *I would shoot them down on the spot. Without any doubt* (10)

This narrative argues for a preference for shooting at both men attempting the robbery by saying that getting shot is the suspect's '*fault*'. The narrative neither speaks of rescuing the employees, nor of the rush to shoot before they were in great danger. Hence, the motive is not the imminence of the danger but the former aggression itself. If a person attempts a robbery, he must accept all possible consequences.

This motivation pays no heed to alternatives. All moderation and care for the life of the suspect are fully disregarded here. Harming them is right because it is a rightful act of repayment for the harm caused, no matter if it is necessary or not. Whatever happens to an assailant, it is his own fault.

We have seen in our legal analysis that harm must be absolutely necessary to be lawful, for citizens have the right to react to help enforce the law, but not to punish. This narrative, however, putting it in Frijda's (1994) words, wants to 'equalize the suffering', making the suspect pay for the harm he attempted to cause. In doing so, it shows us that the gap between state law and the living law can open where citizens are motivated to cause harm, no matter how necessary this is, just to take revenge on suspects.

The prohibition of retaliation in the living law

According to state law, citizens are not criminally liable for causing harm if they react to immediate unlawful dangers. The principle of immediacy forbids acts extending after the moment a danger ceased. Retaliatory harm

is punishable, unless the actor can be excused because strong emotions or a psychological pressure, immediately produced by that danger, was controlling him. If the actor cannot prove this, a judge will consider his act a fresh aggression and find him criminally liable.

To learn how far this principle constrains people in their preferences for reactions, I used the case of the robbery at the supermarket. When respondents expressed a willingness to punch the arrested man, I asked for their arguments for doing so.

These are the motives people state that are incommensurable to state law.

Prison is not enough

Two narratives express a willingness to batter a suspect out of dissatisfaction with the performance of prisons. I heard:

> *It's nice to hit him a bit* [...] *because of what he did. Prison is not enough, he won't be in there very long* (10).

The narrative expresses a willingness exert violence against the suspect, arguing that the arrested person will not be punished harshly enough in prison. This idea could be interpreted in two ways. Either living conditions in prison do not cause enough pain – meaning that the victim could cause some needed extra pain by exerting violence – or sentences are not long enough, meaning that the victim could complement prison with some extra pain in advance. In one way or the other, criminal law sanctions are perceived as too soft, and this is the motive for hitting someone who is no longer attacking nor resisting arrest.

In saying so, this narrative is not arguing for a willingness to exert violence to protect interests from an imminent unlawful aggression, nor to overcome a suspect resisting arrest. Here the motive is simply the intention to supplement legal punishments because they are too lenient. In this sense, this narrative does not resemble any legal principle that enables independent action, but on the contrary, it is subversive as it defies the state's authority to define which sanction is proportionate to the harm caused by an aggression.

This narrative thus shows that a gap between state law and the living law opens where citizens perceive that the state is too lenient in sanctioning, and thereby consider that citizens should add to pain by effecting punishment with their own hands.

Conclusions

In this chapter I have tried to understand the gap between the living law and the limits state law establishes for citizen's arrest. My hypothesis was that people who approve of and express willingness while unaware of the fact

that they accept illegal acts, put forward hegemonic grounds and motives, and those who approve of and express willingness while knowing that these acts go beyond the law, do so on subversive grounds and motives.

This hypothesis would be confirmed if the respondents who accepted *eigenrichting* out of confusion grounded approval and expressed motives based on arguments oriented by legal principles. It would also be confirmed if those approving of and expressing willingness to effect *eigenrichting* while aware of doing so, put forward subversive grounds and motives, i.e. if they applied normative ideas incommensurable to state law. My analysis of the narratives shows that roughly two thirds[82] of those in favour of illegal acts put forward grounds oriented to legal principles, consistent with state law, and roughly a third of the narratives put forward grounds subversive to those legal principles. Most surprising, however, is that half of the narratives offering motives to act unlawfully put forward hegemonic grounds. Naturally, this meant that the other half put forward subversive ones.[83]

I found that respondents use subversive grounds to favour disproportionate, unnecessary and retaliatory harm, and subversive motives to support a willingness to cause disproportionate, unnecessary and retaliatory harm.

I could classify subversive grounds and motives into three forms of argument: the first argues that revenge is a rightful act, the second accepts *eigenrichting* out of disappointment with the states' performance, and the third claims citizens are 'the' enforcers of the law.

The first form of argument argues that revenge is an acceptable way to act, blaming the suspect for what happens to him. This is a ground for approving of disproportionate, unnecessary and retaliatory harm, stating for instance '*Play with fire, get burned*', as was said in support of the woman who ran over the scooter. As a motive, this form of argument expresses a preference for the shooting in the jewellery shop, stating '*it's their own fault*'.

The second form accepts *eigenrichting* out of disappointment with the states' performance, grounding in favour of disproportionate and retaliatory harm. It states for instance, that the woman whose handbag was snatched could run over the scooter because '*the police cannot come on time*', or that the owner of the supermarket could hit the man he had just arrested because in the Netherlands they are '*too soft with punishments*'. As a motive, this form of argument supports a willingness to cause disproportionate and

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82 Twenty-eight of the 47 narratives giving grounds for approval, put forward grounds oriented by legal principles, and 19 used grounds in conflict with them. See Table 4 on page 117.

83 Six of the 11 narratives offering motives to act beyond the law, put forward motives oriented by legal principles, and 5 put forward motives in conflict with them. See Table 5 on page 136.

retaliatory harm, stating for instance that a person could run over a suspect, in the vignette of the handbag snatching, because '*prisons are full of this scum*'. The state is blamed, in that the argument not only denies the role of the state in deciding who should be punished and how harshly, but also establishes the rights of criminal suspects.

To end, the third form of subversive grounds claims that citizens need not care about limits, as they are the true law enforcers in society. The argument supports approval of disproportionate harm, stating that the owner of the supermarket was right to beat the suspect because the Netherlands is '*sweet lazyland*', where nobody provides for proper order, thus requiring citizens to do it. As a motive it argues for running into the scooter and causing disproportionate harm by saying: '*It's not about the contents of the bag*', but a question of principles. Citizens are thus those who enforce principles.

These arguments share not considering limits at all, neither by discussing nor reinterpreting them, removing all forms of constraint from citizens when reacting. Analysing their meaning, moreover, we can conclude that Black (1983) is right here. These forms of argumentation bear witness to a group in society who regard illegal acts as a proper instrument to control crime ('crime as social control'). They show that people who are distrustful of the law because of its principles, its methods or its perceived poor performance in providing security ('the law is less available') support *eigenrichting* while disregarding its illegal nature.

However, people also put forward hegemonic grounds and motives in this context, which consider legal limits but alter them. Hegemonic grounds support disproportionate and unnecessary reactions as much as retaliatory strikes. Hegemonic motives are brought to support a willingness to accept disproportionate and unnecessary reactions as much as pre-emptive strikes.

I was able to classify the hegemonic motives and grounds according to their forms of argumentation: a first form alters the order of pre-eminence between legally protected interests. A second form rejects the special requirements of caution and moderation in state law, known as the *Garantenstellung*. The third ignores the system of double causality to excuse excessive reactions. The fourth lowers legal thresholds considering provocations illegitimate aggressions, and thereby supports pre-emptive strikes.

The first form of argument alters the order of pre-eminence between legally protected interests, disarticulating – either as a ground or a motive – the meaning of the legal limits of proportionality and absolute necessity. As a ground it states for instance: '*Those are important things that she is losing*', thereby justifying the death of the suspect on account of the need to recover a bag. As a motive, it finds not to '*let them rob me that easily*' a good reason to shoot at the torso. The narratives argue that a person can defend material possessions at the cost of a life, without looking for less harmful

alternatives. In this sense, there is an element of proportion and necessity in the argument, which makes the narrative hegemonic. The problem is that material possessions receive pre-eminence over the life of suspects in these narratives, and that is the distinction from the scheme of pre-eminence state law establishes.

The second form of arguments rejects the extra requirements of moderation and caution state law sets for people in a guarantor position (*Garantenstellung*), as they blame emotions and a simple lack of intent for the consequences of the reactions. Emotions are blamed for reactions, as grounds in favour of retaliatory and disproportionate harm. Here, a narrative gives grounds to excuse the supermarket owner because '*He was still angry*' or a motive accepts running over the scooter in the vignette of the handbag snatching, saying: '*it's wrong, but you react like that* […] *it's just an emotional reaction*'. Clearly, this form of argument accepts that the act in itself was *wrong*, and functions as an excuse. In doing so, it demonstrates awareness that a limit was crossed (that of immediacy or proportionality). The argument is thus oriented by legal principles, but in stating that emotions would hinder someone from acting according to them, it departs from the requirements of state law. State law carries with it extra requirements of moderation for the actor, because he or she has greater responsibilities as a licensed driver or a trained shot. The exercise of self-control is compulsory. This form of argument puts it the other way around; one cannot control reactions when one is governed by emotions. This form of argumentation also states that a lack of intent is enough to excuse someone causing disproportionate harm. The argument was only used as a ground to argue that the woman in the case of the handbag snatching could not be blamed because '*It was not her aim*' to kill the young man, she went after the bag and '*lost control*' over the car. The argument states that external circumstances took control of the events, and the car ran uncontrolled into the man, an argument that could also be part of an excuse in state law (*avas*). For state law, however, she was required to have acted as a 'prudent driver', something she did not do in driving backwards at high speed before losing control over her car. The argument, nevertheless, is hegemonic, because it still accepts that a limit was crossed: the act was not right, but the woman is excused.

The third form of argumentation uses repeated experiences of victimization to excuse the actor. Used as a ground, it serves to approve of unnecessarily drastic reactions in the vignette of the robbery at the jeweller's shop, stating: '*I understand why he shot. He had been robbed three times before*'. The argument is hegemonic because the act in itself is not accepted, though 'understood'. The argument recognizes a limit had been crossed, that of necessity, but the person is excused. In doing so, the narrative recognizes the principle of necessity, but puts it in parenthesis by blaming previous experiences of victimization for the reaction. In fact, previous victimization can be part of an excuse in state law. The law establishes, however, that the

reaction must be direct consequence of powerful emotions caused by repeated experiences of victimization. A double causality is required for the legal excuse: that previous experiences of victimizations cause uncontrollable emotions, and that these emotions prevent the person from complying with limits of necessity or proportionality. This double causality is a requirement this argument fails to contemplate. For these narratives, the simple fact that someone was repeatedly a victim of aggression suffices to excuse an excessive reaction, it is not necessary to prove that those experiences caused the emotions that prevented the person from acting within necessity.

A fourth and last form of argumentation lowers the legal thresholds for considering a threat an 'imminent aggression'. This was applied as a ground for approving of unnecessary harm, and as a motive for striking pre-emptively. As a ground it states that the shot to the torso, in the vignette of the robbery in the jewellery shop, was acceptable because the situation was '*very threatening*'. In saying so, the narrative turns a situation of relative danger into one in which the actor had no alternatives than a lethal shot. As a motive, it supports beating a man because '*he touched me*'. In saying so, these narratives overestimate the pressing danger of an act, more readily perceiving an act as an attack and a situation in which the actor had no alternatives than a lethal shot or a blow to the face. The argument thus invokes necessity and makes a temporal consideration, something the law also does, but lowers the legal threshold, because for state law, a man pointing a gun at the ground and an initial physical contact both still leave the actor the space to find less harmful alternatives than shooting at the torso or punching someone in the face. The argument is thus hegemonic, as although it renders an attack as 'more imminent' than judges would do, it is still oriented by the idea of necessity.

Let us now again consider the findings in perspective and draw some conclusions.

My hypothesis was that those who express approval or willingness while unaware of supporting illegal acts use hegemonic grounds and motives, and those who do so while aware, use subversive grounds and motives.

My analysis shows that the kind of grounds and motives people put forward are largely independent of the kind of expressions of approval or willingness they use.

Some narratives approve of acts while being aware that they are illegal on hegemonic grounds. We saw an example of this when a narrative approved of the acts in the robbery in the jewellery, stating:

> *I agree with what he did; to shoot him down* […] *he will be sentenced. But I don't let my things get stolen!* (25)

The narrative approves while aware that a judge could sentence the jeweller; but the ground is not subversive but hegemonic: the jeweller was right to shoot and kill the man because it was 'necessary' to defend material possessions. The narrative recognizes that according to state law, the reaction could have been considered unnecessary (*he will be sentenced*) because the jeweller should have looked for less harmful alternatives to shooting on the spot at the chest of a man (killing him) to protect material possessions. Nonetheless, the narrative argues that the reaction was necessary.

Similarly, narratives express willingness while unaware that they are endorsing illegal acts, using subversive grounds. We saw an example of this in the vignette of the handbag snatching:

> *I would also go after them* [...] *prisons are full of this mucky scum. Do you have to let everything happen?* (25)

The narrative shows no hint of knowing that a judge would convict the woman. However, by saying that a person can drive over a suspect because prisons do not re-socialize inmates, it defies the principle that only judges can punish and decide, based on the law, which sanction should be imposed.

This finding stills the fears of jurists, concerned that enlarging the space for citizens to detain crime suspects with their own forces according to standards outside the law in the books could lead to a spiral of violence in society (Knigge, 2002). My findings show that not everyone who knowingly opposes legal convictions in cases of *eigenrichting* refers to a system of norms subversive to state law. People can contest legal decisions and even be willing to act beyond the law while aware of that fact, while supporting the idea that legal institutions perform the most important role in enforcing the law in society. This happens when they offer legal principles a meaning judges do not and, oppose legal convictions because these decisions contradict their expectations.

My findings show that narratives approving of *eigenrichting* or expressing a willingness to carry it out use hegemonic grounds and motives more often than subversive ones. In fact, of all the grounds and motives collected supporting illegal acts, by far most were hegemonic and only a minority were subversive. Most grounds and motives recognize the legal principles of proportionality, necessity and immediacy, though they interpret them differently from how judges do.

The findings show moreover, the limitations of Black's ideas: distrust of the law can be an explanation for the support of *eigenrichting*, but only for a marginal part of it, namely the subversive living law. However, hegemonic living law finds other grounds and motives to support *eigenrichting*, namely normative ideas arguing in general for the supremacy of legal institutions in the enforcement of law, though 'proposing' new limits for their actuation.

VIII. Conclusions

The starting point for this study is the public debate in the Netherlands about the legitimacy of citizen's arrest. The public debate about citizen's arrest ensued when ordinary citizens were legally prosecuted and convicted for forms of citizen's arrest that ordinary citizens appeared to support but the courts considered illegal. The legal limits for citizens' engagement in law enforcement were contested in this debate.

In the public debate some argue that criminal laws are old fashioned and that district judges should adopt a more flexible attitude toward citizen's arrest. State law needs to ease restrictions on citizens who claim for themselves the right to arrest suspects of crime, and to use force.

This claim collides with a tradition in law, in which the competence for citizens to use force is intended to be restrictive, as coercive means must be held in state's hands (Rutten, 1961; Foqué and t' Hart, 1990; Lissenberg, 1998). A more lenient approach to citizen's uses of force – it is feared – would both endanger civil rights and liberties and undermine the rule of law. It would imply condoning illegal forms of *eigenrichting* and enabling a spiral of escalating violence in society (Knigge, 2002).

The debate about the legitimacy of citizen law enforcement suggests that there is a gap between state law and the living law, i.e. the ideas that ordinary people have concerning the use of force during citizen's arrest. Socio-legal theory assumes that citizens do not accurately know the law in the books, but that they do know the 'living law' consisting of common sense legal ideas. This 'living law' is also what their support for *eigenrichting* is based on. The aim of this study has been to contribute to this debate by establishing first, the extent to which there is a gap between state law and the living law and second, having found that the gap exists, analysing how far it endangers the rule of law, if at all.

To establish if there is a gap, we need to distinguish between an 'objective' gap, i.e. that people approve of actions falling beyond the legal limits while being unaware they are doing so, and a 'subjective' gap, i.e. that they knowingly accept illegal acts. If people accept *eigenrichting* merely out of confusion then there is a gap objectively but subjectively there is not, because people still believe that they are merely bringing state law into life. A subjective gap presupposes that people differ in their approval and willingness from state law, and knowingly do so, building up a system of norms on their own.

In other words, to answer my first question – how far citizens approve of and are willing to commit *eigenrichting* – I needed to find out two things. First, I needed to find out if citizens approve of the actions of others, or, going a step further, also show a willingness to act beyond the law themselves. Second, I needed to find out if citizens, expressing approval of

or willingness to carry out *eigenrichting*, do so knowingly or unknowlingly, i.e. while aware or unaware that they are approving of or expressing a willingness to commit illegal acts. Alternatively, they might also simply be confused about the legal limits to citizen's arrest because, as the results of my legal research show, state law is not as simple and straightforward as one might expect.

In actual practice, the legal system operates through a complex interplay of constraining and enabling norms and principles to establish criminal liability. My analysis of state law shows that citizens are legally allowed to effect citizen's arrest, and even to cause some harm while doing so, as long as they do not harm the suspect with intentions other than stopping an attack or delivering him to the police. Beyond these circumstances, harmful acts carried out in the course of a citizen's arrest are not allowed and are punishable by law. However, while the legal norms provide *in abstractum* for the criminalization of harmful actions, their unlawfulness and the criminal liability of the actor can be excluded. In actual practice, certain principles and jurisprudence guide judges in deciding whether in concrete cases, the exceptions specified by law apply. Exceptions exclude criminal liability when citizens react to an imminent unlawful danger, and in doing so inflict harm that is strictly proportionate and absolutely necessary to that danger. If the actor went beyond those limits nonetheless, he or she could still be excused if they could not be complied with because an emotional or psychological pressure prevented this, or because the person caused harm in the absence of all fault, i.e. the actor took all the required precautions to prevent harm, but the harm was caused nevertheless. Finally, we saw that the system recognizes two corrective criteria that constrain justifications and excuses: when the person relying on them exposed himself to the danger, or possessed skills that would have permitted him to choose a less harmful alternative than the greater harm caused. Finally, my legal research shows that the legal space for citizen law enforcement in society is not static. Over time, changes in the interpretation of the legal norms and principles mentioned have gradually expanded. This became particularly evident recently, in cases of self-defence and improper use of self-defence.

In my empirical research, I have analysed whether and to what extent there is a gap between state law and the living law with regard to citizen's arrest, and how far the gap is subversive to the rule of law (*Rechtsstaat*). More specifically, I have analysed when and why the actions of citizens apprehending the perpetrators of crime, which are legally considered *eigenrichting*, are accepted or reproved by citizens. I have analysed whether and to what extent citizens refer to these limits in their narratives of their approval and willingness to use physical force in arresting citizens. I have also examined to what extent citizens, when referring to these principles, uphold and support them as valid standards (hegemonic) or defy them, proposing standards incompatible to the rule of law (*Rechtsstaat*) (subversive).

In the course of this study, a total of thirty-two people were interviewed in depth and in the following pages, I will discuss the results of an interpretive analysis of their narratives. On the basis of these results, I will show how far citizens approve of and are willing to commit *eigenrichting*, and I will explain how they come to accept illegal forms of citizens' arrest (the gap) by looking at the arguments they offer to support the acts they accept. Finally, on the basis of these results, some modest proposals will be made to bridge that gap.

In my research I found many narratives approving of and expressing willingness to commit *eigenrichting* while showing a lack of awareness of the fact that they concern illegal acts. Focusing on approvals of *eigenrichting* by others, I grouped the narratives into three categories. The first and largest category consists of narratives which question the act itself but excuse the perpetrator for causing unnecessary, disproportionate and retaliatory harm. These narratives perceive that the act in itself crossed normative limits, though not the law, but they either express 'understanding' and forgivingness toward the perpetrator, or suggest less punitive sanctions, such as a reprimand or an apology. A second and smaller category consists of narratives which consider the act in itself as correct or 'rightful' while simultaneously accepting the unnecessary harm caused by the arrest. The third category consists of only one narrative, which recognizes that in principle the act was wrong, but excuses it by explaining that the judge in the case could interpret the reaction of the arresting citizen (inflicting retaliatory harm) in such a way as to allow him to discharge that person by treating the act 'as if' it had been done in self-defence.

Looking at expressions of willingness to (illegal) *eigenrichting*, I clustered narratives into two categories. The first and largest consists of narratives showing an unmistaken inclination to use force, e.g. to shoot a suspect, knock him down or beat him up after an arrest, while clearly being unaware that a judge would see those acts as unnecessary, disproportionate, pre-emptive or retaliatory strikes. The second and smaller category consists of narratives that display a preference for a disproportionate act, i.e. driving after a scooter against the flow of traffic. Although they recognize the act would be 'dangerous', narratives are oblivious of the fact that a judge would find such an act illegal.

Only a small group of the narratives express approval of and/or willingness to commit *eigenrichting* while fully aware of the fact that this would go beyond legal limits. Narratives knowingly approving of *eigenrichting*, believe for instance that a sentence is 'unfair' (when given for a disproportionate act), or express admiration for the actor even though he should be convicted (for causing unnecessary harm). There are hardly any narratives expressing a willingness to commit *eigenrichting* while being aware of crossing legal limits. In fact, only one narrative expressed a willingness to beat up an arrested suspect (retaliatory harm) with the

explicit intention of avoiding criminal prosecution by hiding the action from the police.

Taken together, the analysis of the narratives shows that there is a gap, for narratives allow a larger space for citizen's arrest than the one offered by state law. Along the line of these narratives, we find a wide range of forms of acceptance for *eigenrichting*, ranging from weak forms, where the act in itself is disapproved of but the actor is excused, to strong forms, where the narrative evidences a willingness to take the law into one's own hands. However, most narratives approving of *eigenrichting* display a lack of awareness of its being beyond the law. They approve of the illegal acts of others while remaining ignorant of their illegality. This also happens with narratives expressing a willingness to commit an illegal act, as most of them are oblivious of the fact that these acts would be beyond the law. Only exceptionally do we find narratives either approving or expressing willingness to act while fully aware of the illegal character of the acts concerned. Moreover, a general lack of correlation between expressions of approval and expressions of willingness to commit acts suggests that approval of illegal acts does not imply a willingness to undertake them, but rather acceptance in the sense of tolerance for other people's acts. People may express admiration for the actor or even disdain for a conviction, but these forms of approval do not translate into a willingness to do the same.

Now, considering the fact that most narratives approve of and express a willingness to act while unaware of any illegality, I find the hypothesis that people support unlawful acts out of confusion to be largely confirmed. With confusion, I do not mean that the people in question are bewildered or perplexed by conflicting ideas, because this would have meant a form of paralysis resulting in no opinion at all, neither approval nor willingness. I mean confusion in the sense that most narratives express a lack of understanding or ignorance of crossing legal limits when they approve of or express a willingness to act. Echoing De Roos's (2000) ideas, a gap between state law and the law on the streets opens as a result of confusion over the actual legal space for citizen involvement in the maintenance of law and order. Confused people approve of illegal acts while believing that they are in fact legal. In this sense, most narratives of approval and willingness displayed a lack of awareness i.e. an ignorance or obliviousness to the fact that they were approving of illegal acts.

The next question to be answered is, to what extent the legal consciousness of those supporting certain forms of *eigenrichting* is subversive. In other words, to what extent are the narratives of those fully aware that their approval and willingness crosses legal limits really subversive, i.e. alien to legal principles and defying the rule of law.

To answer this question, I analysed the arguments embedded in the narratives. More specifically, I analysed whether the grounds and motives expressed in them are incommensurable to legal principles (subversive) or,

alternatively, oriented to legal principles (hegemonic). The second hypothesis of this research was that people who approve of and/or express willingness to carry out certain forms of *eigenrichting* while unaware of their illegality will base arguments on hegemonic grounds and motives. On the other hand, those who approve of and/or express willingness to carry out certain forms of *eigenrichting* while aware of their illegality will base their arguments on subversive grounds and motives.

The results of the analysis show that the vast majority of the arguments are hegemonic and only a slight minority can be considered as subversive.

The majority of the narratives express hegemonic arguments oriented by legal principles, which I divided into the following four categories: 1. Overestimation of material possessions; 2. Disregard for the *Garantenstellung*; 3. Overlooking of dual causality; and 4. Preference for prevention.

To the first category belong arguments altering the order of pre-eminence between the law's legally protected interests. They evaluate proportionality and necessity in reactions, albeit in ways different from how legal principles are applied in jurisprudence and the law in the books. In these arguments, for example, material possessions are given pre-eminence over risking the life of an aggressor.

To the second category belong arguments excusing excessive (disproportionate) and harmful (retaliatory) reactions, e.g. by referring to intense emotions, despite the fact that the actor is expected to control them given his legal *Garantenstellung.* These arguments reject special requirements of caution and moderation which the law establishes, for instance for drivers who are compelled to exercise self-control in traffic.

To the third category belong arguments that consider repeated criminal victimization as sufficient reason for someone to cause harm beyond strict necessity. Arguments in this category negate the legal principle that criminal victimization can excuse excessive reactions only when the experience causes such unbearable emotions that it becomes impossible to expect someone to control his or her reactions (double causality).

The fourth, and final, category clusters arguments supporting unnecessary and pre-emptive strikes on the grounds that physical contact suffices for someone to react. These arguments tend to perceive provocations as an aggression, and in doing so justify actions that the jurisprudence and case law actually recognise as the beginning of an illegitimate aggression rather than as a reaction to a preceding one.

What is most remarkable about these forms of hegemonic argumentation is that they make their case by referring to quasi-legal principles. Being part of the living law, their meaning is not identical to the legal principles that the

courts apply. These forms of argumentation, which are to be found in the narratives of ordinary people, make certain alterations to the way legal principles tend to be applied in the official case law and jurisprudence. These arguments thus enlarge the social space for citizen's arrest and, more generally, for citizen's participation in the enforcement of law.

Given that the grounds and motives for supporting *eigenrichting* are based more on hegemonic forms of argumentation than on subversive ones, we could view them as 'constructive'. From this perspective, the first form of hegemonic argumentation, the one stating that citizens can defend material possessions also at the cost of the life of an aggressor, shows that for some people, the legal principles of proportionality and necessity are blurred. The law claims that reactions to aggression should always remain equivalent to the harm the aggression could cause. Citizens must try to find the least harmful course of action. A basic idea here is that material possessions cannot be defended at the cost of life, since putting a life at risk is the ultimate choice – a concept that also applies to citizen's arrest. This idea seems to be unclear to some people, who appear to believe that these rules do not fully apply when the victim tries to arrest a suspect who had just attempted an armed robbery or a handbag snatching.

The second form of argumentation reveals in the living law a counter-trend to jurisprudence and case law. Modern law evolves to require people to be increasingly 'risk-conscious', especially people in guarantor positions (*Garantenstellung*), such as drivers, who are expected to exercise moderation and control their emotions, and be extra cautious when driving. The narratives argue that these extra requirements do not apply to citizens arresting a suspect, because in the heat of the attack and the arrest, emotions can hinder someone from moderate and cautious action.

The third form of argumentation reveals that the relationship of causality required by state law to excuse excessive reactions, between experiences of victimization, emotions and excessive reactions (known as double causality), is unknown to some people. Some citizens approve of unnecessarily drastic reactions simply because the actor was repeatedly a victim of crime. However, to remain within the limits of necessity, state law requires proof that (first) an accumulation of past and new experiences invoked unbearable emotions and (second) that these emotions prevented the actor from controlling his reactions. That double requirement appears to have been ignored by some citizens.

The fourth form of hegemonic argumentation touches on a sensitive point in criminal legal jurisprudence and case law. In the legal world, the limits between forbidden pre-emptive strikes and self-defence have evolved in case law. The trend in court decisions has been to allow increasingly earlier reactions, broadening the space for citizens to react sooner. Some narratives follow this trend and go a step further, perceiving provocations as

aggressions. The threshold between reacting quickly and attacking first appears to be vague for some respondents.

In addition to these hegemonic forms of argumentation, a minority of narratives also carry subversive arguments. They argue that certain forms of *eigenrichting* are acceptable in the living law based on principles incommensurable to those of state law. According to their form of argumentation, narratives were divided into the following three categories: 1. Apology for revenge; 2. Accusation against the state; and 3. Replacement of the state as law enforcer by citizens.

To the first category – used to support disproportionate, unnecessary and retaliatory harm – belong arguments that victims of crime cannot be limited in their reactions because they have the right to strike back. The second category of arguments – used to support disproportionate and retaliatory harm – blames the criminal justice system, stating that the 'poor performance' of the state in delivering security is the reason why the victims take the law into their own hands. The third and final category of arguments – used to approve of disproportionate harm – states that citizens are the true enforcers of law, since nobody else will enforce proper principles in society.

The most remarkable thing about these forms of subversive argumentation is that they make their case by disregarding legal principles. Being part of the living law, their meaning defies the legal principles that the courts apply, and erase the limits state law establishes. These forms of argumentation, which are to be found in the narratives of ordinary people, blame the state and the rule of law. They enlarge the social space for citizen's arrest and, more generally, for citizen's participation in the enforcement of law, ignoring the harm *eigenrichting* can cause by disregarding the civil rights and liberties of suspects of crimes.

In conclusion, the results of the analysis of the grounds and motives expressed in the narratives contradict the second hypothesis, i.e. that arguments for approval of and/or expressions of willingness to carry out certain forms of *eigenrichting* while aware of their illegality will be based on subversive grounds and motives. Even though some of the arguments do indeed rest on subversive grounds and motives, the overall majority of the arguments for approval of and/or willingness to carry out certain forms of *eigenrichting* while aware of their illegality, rest on hegemonic ones. Evidently, it appears possible to support certain forms of *eigenrichting,* and knowingly oppose the legal limits of citizen's arrest, on grounds and motives testifying to a legal consciousness which is oriented to the quasi-legal principles of the living law, and which is therefore hegemonic. However, it is also important to notice that some of these forms of hegemonic argumentation can stretch state law principles to their breaking point. As we saw, when people argue that the recovery of a handbag is worth risking the life of an aggressor, they are oriented to the principle of proportionality.

They weigh proportions between two conflicting goods (the handbag and the life of the aggressor) though they rank them (putting the handbag over the life of the aggressor) in such a way that they in fact deactivate the limits of proportionality. If during an arrest a citizen can risk the life of the suspect to stop him or her, the proportionality principle is no longer a limit. The same happens if in a verbal altercation a citizen finds it appropriate to hit someone after a physical provocation. The principle of the imminence of the aggression then loses its meaning and pre-emptive reactions end up justified. Here we thus see how interpretations of the concrete meaning of legal principles could acquire a subversive rather than a hegemonic meaning according to the ethical ideas people share.

As we have seen, most people approve of other people crossing legal limits in effecting arrest but tend to show little willingness to act themselves. Therefore, we may conclude that the gap between the living law and state law is not all that deep. Approval for the acts of others accompanied by an unwillingness to themselves act beyond legal limits, shows that acceptance is mainly a question of tolerance. Moreover, taking into account that the arguments supporting such acceptance for *eigenrichting*, in most cases, are clearly based on a hegemonic legal consciousness rather than on a subversive one, shows that acceptance for *eigenrichting* is mainly meant to support the primacy of the state in the enforcement of the law rather than endangering it.

Black (1983) argues that *eigenrichting* could be seen as an instrument of social control, as it corrects social standards where the law does not reach, or provides relief for those who never receive legal protection. But this postulate applies only to those willing to engage in *eigenrichting* out of disappointment (subversive) with state law. The question that Black did not approach is how approval for *eigenrichting*, and especially that supported by hegemonic normative ideas, provides for social control. As we saw, hegemonic grounds touch sensitive points in state law: they indicate the blurred areas in the limits between legal and illegal acts, they 'propose' new limits, and most interestingly, they stretch the same legal limits to their breaking point, by deriving their most extreme ideas from standards formulated by state law.

After concluding that the gap between the living law and state law does not appear to be as wide as expected and the danger of subversion does not appear to be as dangerous to the rule of law as jurists tend to fear, we can now discuss the final question: whether the gap between the living law and state law can be bridged by enlarging the legal space for citizen's arrest and which perspectives could be developed on the basis of this research that would enable us to deal more constructively with the inconsistencies between the living law and state law?

However, before offering some modest proposals to bridge the gap between state law and the living law, I would like to stipulate the limitations of my

research. The conclusions I draw from this research are not based on a representative sample of the Dutch population but on narratives I collected in 32 interviews with a heterogeneous sample of citizens with different levels of access to law.

According to Black (1983), access to law would make a difference in terms of support for *eigenrichting*. In Dutch society access to law has been shown to vary by gender, age, social capital, education, cultural background and income. My sample maximized variety in these factors to create diversity in the level of access to law. Following this procedure I obtained a wide-ranging spectrum of subjective perceptions and arguments in Dutch society with respect to the limits to citizen's arrest. Therefore, even though I could not achieve full representativeness for the Dutch population, my conclusions are significant (in the German sense of '*aussagekräftig*') in showing the diversity of positions within the living law concerning the acceptance of and limits to citizen's arrest. Nonetheless, both from a legal perspective and from the point of view of the social sciences, follow-up studies are required.

The possibilities in criminal law for restating the responsibilities deriving from guarantor status (*Garantenstellung*) when citizens cause harm during arrests could be studied. My research shows that some citizens believe that judges should be more lenient in evaluating the criminal liability of a suspect alleged to have transgressed the limits of citizen's arrest due to *Garantenstellung*.

A quantitative sociological study could survey how widespread particular normative ideas are, and which ideas are prevalent in different categories of citizens.

Also, the role that repeated experience of street or property-crime victimization plays in excuses could be re-examined in criminal law. They have not been consistently considered so far as experiences explaining the emotions that excuse excessive reaction.

However, this study's findings already offer some possibilities for developing strategies to bridge the gap between the living law and state law.

Understanding the people's legal consciousness could help evolve state law and policies, to make citizens more responsible without criminalizing their well-intentioned actions. Looking at the confusion evidenced by citizens approving of and expressing willingness to cross the limits of citizen's arrest, the need to explain the precautions they have to take when they attempt an arrest becomes evident. To be able to fulfil their responsibilities and to avoid incurring liability for *eigenrichting*, citizens need clear directions and instructions with regard to the legal limits of citizen's arrest in terms of proportionality, necessity, temporal limits and conditions such as the dual causality between emotions and harm.

Policymakers should consider how to make the legal limits more vivid and accessible, and how to enter the public debate with better clarifications rather than passive forms of information dissemination. Visual information could be inspired by real-life cases taken from case law, and also tackle the ethical problems present in them.

Campaigns in different contexts, such as drivers or shop managers, should also be considered. These campaigns should clarify that these heightened responsibilities demand that they exercise control over their emotions, and external circumstances.

These are ways to address people's legal consciousness and to deal more constructively with the inconsistencies between the living law and state law. However, we should be aware of the limitations and consequences of such endeavours because, as we learned from the socio-legal studies, the gap between the living law and state law does not only depend on the law.

Legal consciousness changes with the discourses on what is acceptable and the arguments available in society, thus changes in state law, either as it is written in books or stated by judges, will not completely provide coherence between state law and living law.

Hegemonic and subversive normative ideas demonstrate the need for an ethical debate about the value of civil rights and liberties, and the means acceptable for upholding them. A similar debate has been held before to discuss how far police officers can go in using force to prevent and investigate crimes. This time, such a debate is required to address the new issues resulting from citizens being openly called to contribute to enforcing the law.

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